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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 337

**INTERNATIONAL UNION OF MINE, MILL AND
SMELTER WORKERS, LOCALS NO. 15, 17, 107, 108
AND 111, AFFILIATED WITH THE CONGRESS OF
INDUSTRIAL ORGANIZATIONS, PETITIONERS,**

vs.

**EAGLE-PICHER MINING AND SMELTING COM-
PANY, EAGLE-PICHER LEAD COMPANY, AND
NATIONAL LABOR RELATIONS BOARD.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 11, 1944.

CERTIORARI GRANTED OCTOBER 16, 1944.

Supreme Court of the United States

October Term, 1944

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SMELTER WORKERS, LOCALS No. 15, 17, 107,
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vs.

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CORPORATIONS,

AND

NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

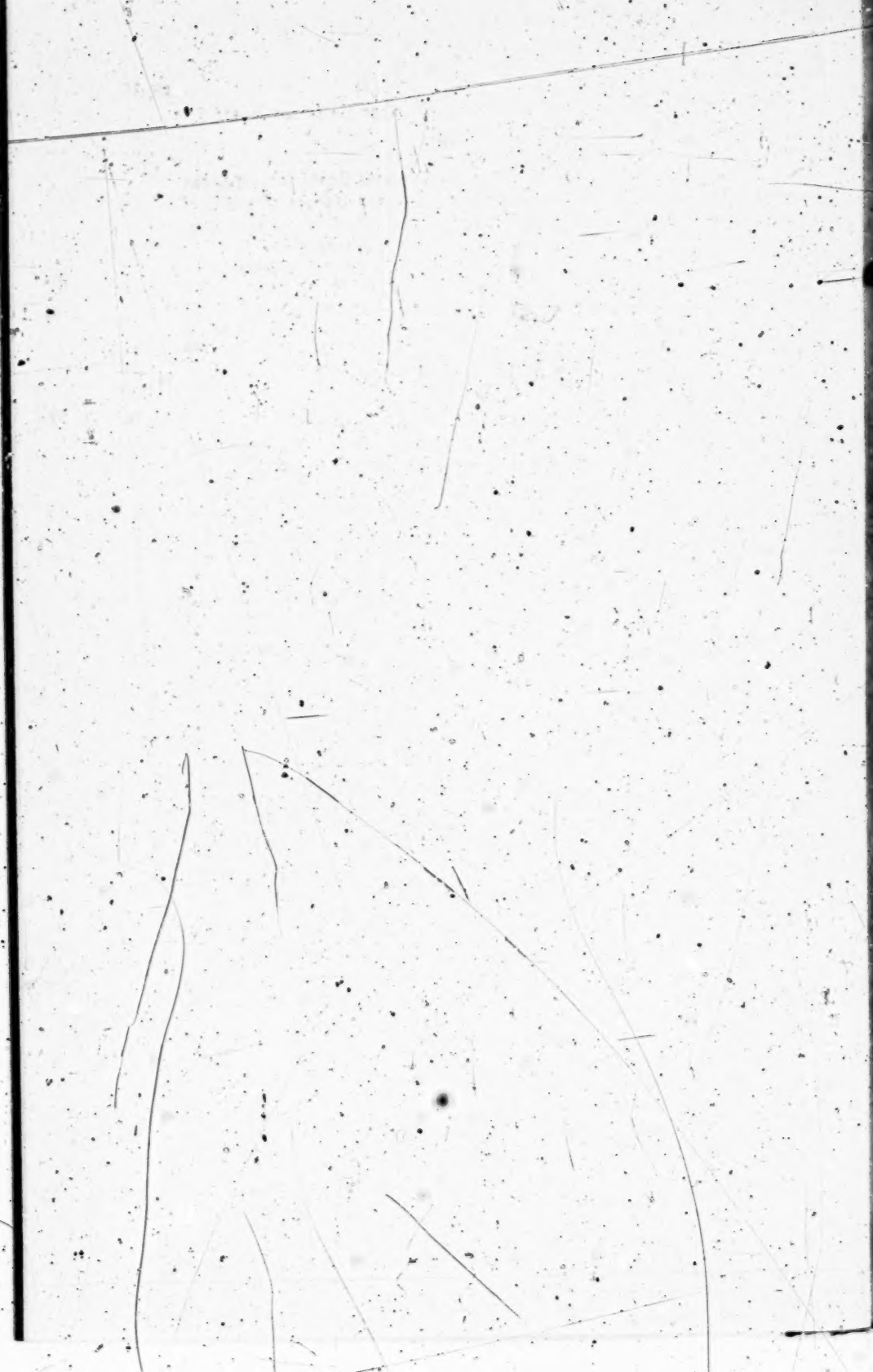
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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the March Term, 1944, of said Court, before the Honorable John B. Sanborn, the Honorable Joseph W. Woodrough and the Honorable Harvey M. Johnsen, Circuit Judges, as prepared in pursuance of praecipe filed by counsel for Intervener.

(Seal)

E. E. KOCH,
Clerk, U. S. Circuit Court of
Appeals for the Eighth Circuit.

(Praeceptum for Transcript for Supreme Court, U. S.)

In the United States Circuit Court of Appeals for the
Eighth Circuit.

Eagle-Picher Mining & Smelting Company, a corporation,
and Eagle-Picher Lead Company, a corporation,
Petitioners,

No. 640. vs. Original.

National Labor Relations Board, Respondent,
and

International Union of Mine, Mill and Smelter Workers,
Locals No. 15, 17, 107, 108 and 111, affiliated with
the Congress of Industrial Organizations, Intervener.

To the Clerk of the United States Circuit Court of Appeals
For the Eighth Circuit:

The International Union of Mine, Mill and Smelter Workers, Locals 15, 17, 107, 108 and 111, Intervener herein, is about to apply to the Supreme Court of the United States for a writ of certiorari to review the orders of this Court made on April 19, 1944, denying the motion of the National Labor Relations Board for judgment on its petition for rule to show cause, to vacate and to remand and for other relief, rehearing denied by this Court on May 17, 1944, and further denying on May 17, 1944, the motion of the International Union, etc., intervener, to modify the decree or to remand.

Please, therefore, prepare and certify a transcript of record to be transmitted to the Supreme Court of the United States, and include therein the following:

1. The decision and order of the National Labor Relations Board decided October 27, 1939, as amended December 14, 1939.

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2. Petition of International Union, etc., to intervene filed February 10, 1940.

3. Order of Court dated February 10, 1944, permitting International Union, etc., to intervene.

4. Opinion of Court dated May 21, 1941.

5. Decree of Court dated June 27, 1941, enforcing the order of the Board, and including only the portions set out in Exhibit A in Appendix to the Board's Petition for Removal.

6. Petition of the National Labor Relations Board for rule to show cause, to remand and for other relief filed February 4, 1943.

7. Appendix-Exhibits to said Board's petition for rule to show cause, to remand, etc., filed on February 4, 1943.

8. Order of this Court dated August 9, 1943, permitting said Board's motion for rule to show cause, etc., to be filed and requiring the Eagle-Picher Mining and Smelting Company and the Eagle-Picher Lead Company to file answer thereto.

9. Motion of said Companies dated September 20, 1943, requesting leave to file joint and several plea to jurisdiction, etc.

10. Order of this Court dated October 5, 1943, granting leave to said Companies to file joint and several plea to jurisdiction, etc.

11. Joint and several plea to jurisdiction; motion to dismiss, demurrer and answer of said Companies to petition for rule to show cause, etc., filed October 5, 1943.

12. Motion of said Board for judgment as requested in petition and filed November 16, 1943.

13. Opinion of this Court dated April 19, 1944.

14. Order of this court dated April 19, 1944, denying said Board's motion for judgment and dismissing the Board's petition in nature of a bill of review.

15. Petition of said Board for rehearing filed May 4, 1944.

16. Motion of International Union, etc., for leave to file its motion to modify decree or to remand, filed May 11, 1944.

17. Order of Court dated May 17, 1944, granting the International Union, etc., leave to file said motion to modify decree or to remand.

18. Motion of International Union, etc., intervener, to modify decree or to remand, filed May 17, 1944.

19. Order of court dated May 17, 1944, denying the Board's motion for rehearing.

20. Order of court dated May 17, 1944, denying the motion of Intervener to modify decree or to remand, etc.

21. Extracts from pages 6622, 6626, 6627, 6636, 6637, 6638, 6666, 6667, 6672, 6677, 6679, 6683, 6688, 6689, 6712, 6833, 6834, 6835, 6882, 6907, 6909, 6910, 6924, 6929, 6936, 6937, 6945, 6946, 6947, 6957, 6958, 6962, 6970, 6983, 6989, 6993, 6994, 7076, 7413, 6825, 6826, 7233, 7234, 7238, 7239, 7261, 7262, 7272, 7369, 7370, 13459, 13461, 13462, 13463, 13465, 13466, 13467, 13468, 13470, 13471, 13472, 13473, 13474, 13476, 13477, 13478, 13480, 13481, 13482, 13483, 13484, 13924, 13926, 13932, 13940, 13941, 13991, 13992, 13993, and 14000 of the typewritten transcript of record filed in this cause, the specific parts thereof being set out in the appendix attached hereto.

22. Board Exhibits 237, 238, 239, 260, 261, and 262.

23. Extracts from pages 215 and 216 of the Companies' statement, brief and argument in support of its petition for review of the Board's order and decision dated October 27, 1939, the specific parts thereof being set out in the Appendix attached hereto.

24. Extracts from pages 4, 5, 26, 33, 34 and 49 of the Companies' brief on the Board's petition for rule to show cause, to vacate and remand, etc., the specific parts thereof being set out in the Appendix attached hereto.

LOUIS N. WOLF,
SYLVAN BRUNER,
Attorneys for International
Union, etc.

(Endorsed): No. 460, Orig. Filed in U. S. Circuit Court of Appeals on Jul. 26, 1944.

(Extracts from Testimony before the Trial Examiner.)

Page J. W. NEWBY, a witness called by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

[6622] By Mr. Madden:

Q. State your name, please.

A. J. W. Newby.

Q. With what company are you connected?

A. Eagle-Picher Mining & Smelting Company.

Q. In what capacity?

A. Personnel manager.

. . .

[6626] Q. Do you ever recall about September, 1935, of a conversation with Ernest Bogle?

. . .

[6627] A. Yes, I believe he applied for one, and I told him we had a full crew at that time.

. . .

[6636] Q. Do you remember a man by the name of Glenn Woods? A. Yes, sir.

Q. Was there some conversation with him early in June also about coming back to work?

A. I talked to Glenn a couple of times, yes. Both times at the office.

Q. In June, 1935?

A. Yes. Before the plant opened.

. . .

Q. Very well. Do you recall subsequently whether or not he did make application?

A. Yes. He met me on the scales there one evening, I believe it was, and said he would like to go back to work. I told him at that time that we were full up on packers. He was a white lead packer.

Q. And that was true?

A. That was true, yes.

• • •

[6637] By Mr. Madden:

Q. What year, though, Mr. Newby?

A. That was along late summer, I would say; fall.

Q. Of 1935? A. Yes.

• • •

By Mr. Madden:

Q. Do you remember Lawrence Woods?

A. Yes, sir.

Q. What did he do at the plant?

A. He was a furnace man.

Q. Do you recall when it was that he applied for reemployment?

A. Him and his son, Otto, came down there some time after we started up; I would say two or three months.

Q. I have here from your records November 16, 1935. Is that your recollection?

A. That's about right.

Q. What occurred?

A. I told Lawrence and the boy, both, that we had a full crew.

Q. And that was true?

[6638] A. That was true; yes, sir.

• • •

[6666] WALTER GEORGE, a witness called by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

By Mr. Madden:

Q. State your name, please.

A. Walter George.

Q. Are you connected with the Eagle-Picher Lead Company?

A. I am.

• • •

By Mr. Madden:

[6667] Q. And that position is that you are in charge of personnel?

A. Yes, sir.

[6672] . . .

Q. Mr. George, do you remember a man by the name of Orvin Blinzler?

A. Yes, sir.

Q. Do you recall whether or not in the latter part of 1935 he applied to you for employment?

A. Yes, he came in to see about work.

Q. And what, if anything, did you advise him?

A. That we were filled up at that time, didn't have any jobs open.

Q. Was that true?

A. It was.

. . .

[6677] By Mr. Madden:

Q. Do you remember any incident with Mr. Doty?

A. Mr. Doty was there several times and we discussed that.

Q. What, if anything, did you tell him?

A. We had nothing at the time.

Q. Was that true?

A. Absolutely.

. . .

[6679] Q. Do you recall a man by the name of J. R. Hayes?

A. Yes, sir.

Q. Do you recall his ever applying to you in the fall of 1935?

A. He did.

Q. What, if anything, occurred?

A. Nothing, only that we were full up at the time.

. . .

[6683] Q. Do you remember Joshua Roberts?

A. Yes, sir.

. . .

Q. Sometime after the plant reopened and was operating did he come to you to apply?

A. Yes, sir.

Q. And what did you tell him?

A. That jobs were full.

Q. And that was a fact?

A. That was a fact.

• • •

[6688] By Mr. Avrutis:

Q. So that you are receiving fairly constant applications?

A. Not lately, no.

• • •

Q. Is the plant cutting down, is that it? Is the plant beginning to contract at the present time?

A. Contracted.

Q. The plant has contracted?

A. Contracted.

• • •

[6689] Q. So that you don't have much of an outside labor turn over?

A. We have not for some time.

Q. I don't mean while the plant is contracted, but I mean at the time of normal operation and since the strike, was there not a considerable labor turn over of men leaving the plant and others coming in?

A. Oh, not much.

• • •

[6712] By Mr. Madden:

Q. And the Examiner asked you about whether you took back any of these men that struck. I will ask you if it is not a fact that of the crew of men that worked after the strike, over 90 percent of those men were the men who struck on May 8?

A. Yes, sir.

• • •

JOHN CAMPBELL, a witness called by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

By Mr. Madden, counsel for the Companies:

[6833] Q. So that when the mines, mill, and smelter started up after the strike, the companies reverted to the old and regular system of employment and work?

A. Yes, sir.

Q. And the result of that was that the operations conducted under N. R. A. before the strike were conducted by a greatly reduced number of employees?

A. Yes, sir.

Q. In addition to N. R. A. swingmen, in order to fill in the N. R. A. system of operations, was it also necessary at Galena to have a number of N. R. A. extras?

A. Yes, sir.

[6834] Q. Now, of course, the N. R. A. Swingmen's job and the N. R. A. extra's job disappeared with the invalidation of the Act?

A. Yes, sir.

Q. And the result of that was, with no longer any system of spreading the work; that the same operations were conducted with a much reduced force of men?

A. They were.

. . .

[6835] By Mr. Madden:

Q. I will ask you if on account of the system of spreading or staggering the work and the inefficiency produced by the N. R. A. operations, the number of men essential to such operations was reduced more than a mere 2/7ths.

A. Yes, sir.

. . .

[6882] By Mr. Madden:

Q. Harry C. Beyer: I have him listed as a yardman at the Galena smelter. Is that correct?

A. Yes, sir.

Q. What, if anything, happened to his job?

A. That expired with the invalidation of the N. R. A. He was an N. R. A. swingman on the yard crew.

By Trial Examiner Ringer:

Q. Do you mean by that, Mr. Campbell, that you didn't have a yardman at the Galena smelter?

• • •

A. Yes, didn't have a swingman.

• • •

[6907] By Mr. Madden:

Q. Assuming that this particular claimant Ernest Bogle, worked a couple of days one week and 3 days the next week, off and on, was that type of employment continued after the invalidation of the N. R. A.?

A. No, sir.

• • •

[6909] Mr. Madden—W. E. (Mark) Bond.

By Mr. Madden:

Q. Is listed here as a machine helper at the Tulsa Quapaw.

• • •

Q. In connection with Bond employed at the time of the strike at the Tulsa Quapaw. Was the Tulsa Quapaw mine ever operated after the strike?

• • •

[6910] A. No, sir.

Q. By the Company?

A. Not by us.

Q. It was sold?

A. Yes, sir.

• • •

[6924] Q. The next claimant is Nick Bratz, listed as a trackman at the Big John mine.

A. Yes, sir.

Q. What, if anything, happened to the job that he was holding at the time of the strike?

A. He was working on the night shift but the night shift was discontinued at that mine.

Q. Never been operated on a night shift since the strike?

A. No, sir.

. . . .

[6929] Q. The next claimant I have is E. E. Browning, a shoveller at the Bendelari Mine. Is that correct?

A. Yes, sir.

Q. What, if anything, do your records show as to physical disability or incapacity?

A. He has an anomalous condition in the back which bars him from employment under our rule.

Q. When was the Bendelari Mine sold?

A. On June 30, 1936.

Q. And has never been operated by the company, of course, since that time?

A. No, sir.

. . . .

By Mr. Madden:

[6936] Q. As to the man James O. Bryant, what, if anything happened to the job that he was performing?

. . . .

[6937] A. Well, the job ended with the strike because they cut down the work in that drift, reduced the number of machine men considerably in the production from that drift. Mainly development work from then on.

. . . .

[6945] Q. Archie Bunch, at the Bendelari?

A. Shoveller.

Q. And the Bendelari, was sold on January 30, 1936?

A. June 30.

Q. June 30, 1936?

[6946] A. June 30, 1936.

Q. R. F. Burgett.

A. He was a machine man at the Tulsa Quapaw Mine.

. . .

Q. The Tulsa Quapaw was one of the mines that was never in operation after the strike?

A. Yes, sir.

. . .

Mr. Avrutis (Board Attorney). At this point, I just want to clarify the record.

By Mr. Avrutis:

Q. Although it is true that certain of these mines, the Bendelari for instance, was sold in June of 1936, and apparently the Tulsa Quapaw Mine was not reopened after the strike, it is also true, is it not, Mr. Campbell, that there were other mine workings which were opened for the first time, or let us say, operated for the first time after the strike by the Eagle-Picher Company?

A. Very small.

[6947] Q. But there were?

A. I believe in 1937 a few months the Swalley, I believe with a crew of probably, oh, 15 to 20. And then the D. C. and I think they were both of them for a short time.

. . .

By Mr. Madden:

[6957] Q. Roy A. Cottongin at Galena?

A. Jumbo furnace man.

Q. And what was his job at the jumbo furnace?

[6958] A. As N. R. A. swingman.

. . .

[6962] Q. Everett J. Faries at the Bendelari Mine?
A. He was a mule driver.

Mr. Madden: I am omitting reference to the sale from here on, to the sale of the Bendelari on June 30, 1936, and to the fact that the Tulsa Quapaw, Grace B., King Tut, Longacre, etc., were never operated after the strike.

Trial Examiner Ringer: Well, he has testified to that, and that applies equally to all of them.

. . .

[6970] By Mr. Madden:
Q. Luke A. Griffitt at the Big John?

A. He was powder man.

Q. And what, if anything, occurred in connection with this man's job after the strike?

. . .

A. This man was working at shaft No. 86 and production was discontinued at that shaft after the strike.

. . .

[6983] A. Paul Hollingsworth was a jig helper in a concentrator mill at the Galena smelter.

By Mr. Madden:

Q. What happened to his job after the strike?

A. A part of the jigs at the mill were abandoned. The jig particularly on which Mr. Hollingsworth was working was never operated after the strike.

. . .

[6989] By Mr. Madden:

Q. Recie F. Jones at Galena?

A. He was bathhouse man at the time of the strike.

Q. Was his employment continued after the strike?

A. No, sir.

. . .

By Mr. Avrutis:

Q. Does that mean that the bathhouse was abolished?

A. No; he was an N. R. A. extra man at the bathhouse. We didn't use as many men at the bathhouse after the strike as we did before. We didn't need as many because the men could work 6 days a week.

• • •

[6993]

By Mr. Madden:

Q. Ben V. Kerney, at the Big John?

A. He was a bumper.

• • •

Q. What, if anything, happened to the job that man had at the time of the strike?

A. There was no job that he had filled after the strike.

• • •

By Trial Examiner Ringer:

Q. You mean you didn't have any bumpers at all?

A. None at that shaft.

• • •

[6994]

By Mr. Madden:

Q. What happened to shaft 74?

A. They ceased hoisting at that shaft and, therefore, used no bumpers at shaft 74. The hauling methods were changed.

• • •

[7076]

Q. At the Big John after the strike, what happened to the bruno men?

A. The bruno men were, I believe, entirely dispensed with in that they put in drags at that mine, and in most instances did away with shovelers, or used very few shovelers, and no bruno men.

• • •

By Mr. Avrutis:

Q. They put in drags sometime after the strike?

A. At various times. I think they entirely mechanized that mine.

• • •

[7087] By Mr. Madden:

Q. Ora Williams, at the Grace B. Mine?

A. Pumping at the Grace B.

Q. And that mine was never operated after the strike?

A. No.

Q. Raymond Williams, at Galena?

A. N. R. A. clean-up.

Q. He was a swingman as distinguished from an extra?

A. Yes; in that classification.

• • •

[7232] Q. By the way, you mentioned yesterday, and Mr. Newby described the swing crew system at Galena. Except at the Central Mill you didn't have a swing crew system under the N. R. A.?

A. No.

Q. How did you operate and restrict the number of hours per week?

A. We operated the mines 5 days per week.

Q. When I used the term "you" I meant, of course, the mines as distinguished from the other company operations. Upon the invalidation of the N. R. A. then and the return to previous methods of operation, you could accomplish the same results with a much reduced crew?

A. Yes, sir.

• • •

[7413] By Mr. Madden:

Q. Do you have the date when the Southside Mine shut down?

A. It shut down on January 2, 1936.

Q. Has it ever been operated since?

A. No. I don't believe it has been operated since.

By Mr. Avrutis:

Q. It has been operating since?

A. I don't think so, unless it was just a very short time.

[6825]-

[6826] By Mr. Madden — John Campbell, witness.

Q. Following the strike what was the policy of respondent companies with reference to employing their former employees in their plants before the strike?

A. That was done to the greatest extent possible.

• • •

[7233] Mr. Madden — John Campbell, witness.

Q. When it was determined to reopen the mills and the mines, did you adopt any policy as to those men who should be employed or re-employed at that time?

A. Yes, sir.

Q. What was that?

A. To the greatest extent possible to re-employ men who were working at the time of the shut-down by strike.

• • •

[7234] Q. As a matter of fact, Mr. Campbell, did you follow out the policy that you have mentioned, to employ so far as possible the men who were working at the time of the strike?

A. Yes, sir.

• • •

[7238] Q. And I think the record shows the Galena smelter reopened on the 16th of July after the abortive attempt to reopen June 28.

A. Yes, sir.

Q. How long after the 16th was it before the smelter was in normal operation?

A. Possibly ten days to two weeks.

[7239] Q. And in the mines and at the mill and at Joplin, were the operations of the company normal, and the mines, mill and smelter in normal production and operation prior to the 1st of July?

A. Yes, sir.

[7261] April 20, 1938. Mr. Madden — John Campbell, witness.

Q. What is the present price of ore?

Mr. Wolf: Objected to as immaterial.

Mr. Madden: We propose to show that the conditions in the summer of 1935, when the union attributes to us a great desire to re-open the mines, mills and smelters, are substantially the same as today when mines are closing and when the price of ore is so low that we are operating at a loss.

[7262] A. The market price of zinc concentrates at this time is \$26 per ton.

Q. And what was the price in May and June, 1935?

A. \$26.

[7272] Q. At the present time, Mr. Campbell, on this price ore have a number of mines closed down?

A. Yes.

[7369]

[7370] By Mr. Madden:

Q. By the way, Mr. Campbell, when the different operations were resumed in 1935, were a certain number of new men employed who applied?

A. There were.

Q. And gradually as other former employees applied, did you in most instances attempt to eliminate the new men?

A. Yes. I think, in fact, the most of them were eliminated in a short period of time.

(Extracts from the Companies exceptions to the Intermediate Report filed with the National Labor Relations Board.)

that respondent Mining Company offer to the persons therein designated immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges (such exception being taken severally, separately and independently to the reinstatement thereunder of each of said persons) for the reason that said recommendation as to each of said persons . . . that there is no evidence that said person's former employment or any employment with respondents, or either of them, was available on or after July 5, 1935, . . . that the former employment of said person has disappeared due to a change of operations, . . . that the former employment of said person has been discontinued and is no longer available, . . .

- [13461] . . .
- [13462] . . .

120.

Respondents except to the recommendation in the Intermediate Report (par. 3 (b)) to the effect that respondent Mining Company make whole the persons designated for any losses of pay they may have suffered by reason of respondent Mining Company's alleged discrimination in the manner specified (such exception being taken severally, separately and independently to the award of back wages thereunder to each of said persons) for the reason that said recommendation as to each of said persons . . . that there is no evidence that said person's former employment or any employment with respondents, or either of them, was available on or after July 5, 1935, . . . that the former employment of said person has disappeared due to a change of operations, . . . that the former employment of said person has been discontinued and is no longer available, . . . each and all of the matters aforesaid precluding any award of back wages; . . . ignores the evidence of respondents' requirements and availability of work; . . .

- [13465] . . .
- [13466] . . .
- [13467] . . .

121.

Respondents except to the recommendation in the Intermediate Report (par. 3 (c)) to the effect

- [13468] . . .

that respondent Mining Company make whole the persons therein named for any loss of pay as therein specified . . . for the reason that said recommendation as to each of said persons . . .

- [13470] that there is no evidence that said person's former employment or any employment with respondents, or either of them, was available on or after July 5, 1935, . . . that the former employment of said person has disappeared due to a change of operations, . . . that the former employment of said [13472] person has been discontinued and is no longer available, . . . each and all of the matters aforesaid precluding any award of back wages; . . . ignores the evidence of respondents' requirements and availability of work; . . .

122.

- [13473] Respondents except to the recommendation in the Intermediate Report (par. 3 (d)) to the effect that respondent Lead Company offer to the persons designated, immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges (such [13474] exception being taken severally, separately and independently to the reinstatement thereunder of each of said persons) for the reason that said [13476] recommendation as to each of said persons . . . that there is no evidence that said person's former employment or any employment with respondents, [13477] or either of them, was available on or after July 5, 1935, . . . that the former employment of said person has been discontinued and is no longer available, . . . each and all of the matters aforesaid precluding any award of reinstatement or [13478] back wages, . . . ignores the evidence of respondents' requirements and availability of work; . . .

123.

- [13478] Respondents except to the recommendation in the Intermediate Report (par. 3 (e)) to the effect that respondent Lead Company make whole the persons designated for any losses of pay they may have suffered . . . for the reason that said recommendation as to each of said persons . . . that [13480] [13481] there is no evidence that said person's former

- employment or any employment with respondents, or either of them, was available on or after July
- [13482] 5, 1935, * * * that the former employment of said person has disappeared due to a change of operations, * * * that the former employment of said person has been discontinued and is no longer available, * * * each and all of the matters afore-
- [13483] said precluding any award of back wages; * * * ignores the evidence of respondents' requirements and availability of work; * * *

124.

- [13484]^b Respondents except to the recommendation in the Intermediate Report (par. 3 (f)) for the reasons and upon the grounds specified in the exception hereinbefore appearing relating to a prior recommendation (par. 3 (c)).

(Extracts from Companies argument before the National Labor Relations Board in Washington, D. C. on December 13, 1938, on exceptions to the Intermediate Report.)

Page

- [R. 13924] United States of America, Before the National Labor Relations Board.

Eagle-Picher Mining & Smelting Company, a corporation, and Eagle-Picher Lead Company, a corporation, and International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108 and 111, Case No. C-72 and C-73.

Room 442
Shoreham Building
Washington, D. C.

A hearing was held in the above matter for the purpose of Oral Argument at the above place on December 13, 1938, at 10:00 A. M.

Before:

J. Warren Madden, Chairman
Edwin S. Smith, member

Appearances:

Lewis Gill, of Counsel to the Board

For the Company:

Harry W. Blair,
Tower Bldg.,
Washington, D. C.

For the Union:

Louis N. Wolf, Joplin, Missouri,
Sylvan Bruner, Pittsburg, Kansas.

[13925] Argument for Respondents.

• • •

[13926] Mines are closing daily. The future of an industry is in the balance. • • •

[13932] • • • I stress that economic situation, however, because it discloses unambiguously that the operators had no interest in reopening the mines and smelters at that time; no interest in reopening the mines because they were operated at a loss; no interest in reopening the smelters because the stocks of ore on hand were beyond their capacity.

[13940] • • • Your Honor has seen the pay rolls introduced in evidence in this case. You have observed that of all the men employed in July, 1935, over ninety per cent in every instance, at every mine, at every mill, at every smelter, were the men who had worked at the time of the strike. • • •

When I say, moreover, that over ninety percent of the men working in July after the mines, the mill and smelter opened were former employees, I mean former employees on May 8th, 1935. If you include, as well, former employees of the company who did not happen to be employed on that day, then the percentage runs, I believe,

about ninety-five percent. That demonstrates, I submit, that there could have been no discrimination, and that certainly these respondents and other operators were not interested in conspiring to reopen the mines or to destroy a union organization.

[13941] Such was the situation as we approach the day of July 5th when the National Labor Relations Act became effective. Prior to July 5th the evidence shows that conditions were normal. Production was proceeding normally. Every mine, mill and smelter was operating to normal capacity with one exception—and one exception only. That exception, of course, was the Galena smelter which had been closed by lawless violence, and which was kept closed by the troops to avoid a recurrence of that violence. It cannot be suggested, there is not an item of evidence in the record to justify the conclusion, that any dearth of labor precluded its reopening. Hence normalcy had been established. All of these acts, everything that is charged against us in this plethoric indictment read by counsel, occurred prior to July 5th, 1935.

[13991] * * * Another consideration to be advanced here is that, if the employment which the claimant had at the time of the strike has since then for non-discriminatory reasons disappeared, reinstatement is manifestly both a legal and a factual impossibility. Here is property sold. Certainly no reinstatement can be had under those conditions. * * * There are a number of means whereby these various types of employment have disappeared. The sale of property, the change of methods of operation, the invalidation of the National Recovery Act; any one of these occurrences can destroy the claim.

* * * Counsel has remarked that the whole theory of reinstatement is based upon the attempted restoration of status quo. That is an equitable doctrine, and one of the ancient and

[13993] most basic conditions for the exercise of that doctrine is that there should not have been such a lapse of time as to render such restoration practically impossible. Here we have a change in wage scales, changes in operation, changes in properties. . . . Under those circumstances would it not take the wisdom of a Solomon and the accuracy of an Archimedes to attempt the restoration of status quo without injustice? That is a consideration which must be impelling to any trier of fact.

. . .

[14000] I am discussing this matter in the last few moments tonight from broad aspects, because your Honor knows, as I know, that this case has implications far beyond the claimants or the respondents who are involved in it. The expectancy of a district is involved. . . .

In the Matter of EAGLE-PICHER MINING & SMELTING COMPANY, A CORPORATION, and EAGLE-PICHER LEAD COMPANY, A CORPORATION, and INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS, LOCALS NOS. 15, 17, 107, 108, AND 111

Case No. C-73.—Decided October 27, 1939

Lead and Zinc Mining and Smelting Industry—Interference, Restraint, and Coercion: control of administration of, and financial and other support of, labor organization; utilized by employer to break strike of outside union; participation by employer representatives in affiliation of company-dominated organization with national organization; use of violence against strikers; responsibility of employer for actions of its supervisory officials; employer ordered to withhold recognition from favored organization, pending Board certification, unless similar recognition granted to organization opposed by employer—*Discrimination:* requiring membership in company-dominated and supported organization as condition to employment; virtual closed-shop agreement with that organization; discharge of supervisory official for resisting employer pressure to force men in his department into favored labor organization; burden upon respondent to disentangle the consequences for which it was chargeable from those from which it was immune; charges of, not sustained as to certain persons—*Contract:* employer ordered to cease giving effect to virtual closed-shop contract with favored organization—*Regular and Substantially Equivalent Employment:* factors considered in determination of; comparison of wages, working conditions, regularity of employment, geographical considerations; statement of subsequent employer that employment was to be of an indefinite duration, as establishing; found, as to certain employees; employer nevertheless ordered to offer them employment—*Strike:* begun prior to effective date of Act; held current labor dispute on and after effective date of Act; strikers retain employee status—*Employee Status:* managerial or supervisory employee as an employee within the meaning of Section 2 (3) of the Act—*Collective Bargaining:* charges of refusal to, dismissed upon failure to prove majority in an appropriate unit—*Reinstatement Ordered:* of strikers discriminated against, and others, discriminatorily discharged; grounds for refusal of; compliance with an illegal condition, as; violence, persons guilty of, as—*Back Pay:* lump sum; proportionate distribution among those discriminated against.

Mr. W. J. Averitis, Mr. Harry C. Duncan, Jr., and Mr. D. B. McCalmont, Jr., for the Board.

Mr. Harry W. Blair, of Washington, D. C., Mr. John C. Madden, of Kansas City, Mo., and Mr. H. C. Wallace, of Miami, Okla., for the respondents.

Mr. Sylvan Bruner, of Pittsburg, Kans., and Mr. Louis N. Wolfe, of Joplin, Mo., for the International.

16 N. L. R. B., No. 71.

Mr. Louis N. Wolfe, for John R. Sheppard.
Mr. Richard Salant, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed by International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111, herein called the International, the National Labor Relations Board, herein called the Board, issued its complaint,¹ signed by Chairman J. Warren Madden and members Edwin S. Smith and Donald Wakefield Smith, and dated November 8, 1937, against Eagle-Picher Mining & Smelting Company and Eagle-Picher Lead Company, herein collectively called the respondents, alleging that the respondents had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing were duly served upon the respondents, the International, and Tri-State Metal Mine & Smelter Workers Union, herein called the Tri-State Union.

In respect to the unfair labor practices, the complaint alleged in substance: (1) for the first cause of complaint that although on May 8, 1935, the International represented a majority of the employees of the respondents in an appropriate unit, the respondents on that date and at all times thereafter refused to bargain collectively with the International; (2) for a second cause of complaint that subsequent to a strike called by the International, the respondents on May 27, 1935, "intending to form and dominate a labor organization, thereafter known as the Tri-State Metal Mine & Smelter Workers Union . . . entered into and formed a common plan or conspiracy," that thereafter the respondents formed and established, and assisted and supported financially said Tri-State Union, and that since June 5, 1935, the respondents have required as a condition of employment membership in the Tri-State Union and have refused to employ members of the International, thereby discriminating against certain named individuals; (3) for a third cause of complaint, that the respondents at various times subsequent

¹ On charges duly filed, a complaint covering substantially the same issues had been filed against the respondents on May 23, 1936. Hearings were postponed after the respondents had brought a bill of injunction against the Board. This injunction was dissolved on May 27, 1937. *Daniel M. Lyons, et al. v. The Eagle-Picher Lead Company, a corporation, and The Eagle Picher Mining & Smelting Company, a corporation*, 90 F. (2d) 321 (C. C. A. 10th).

to July 5, 1935, "employed and exercised and continued to employ and exercise violence and armed force against persons and the property of persons who were or are members of the International Union."

On November 15, 1937, the respondents filed an answer which, as amended before and during the course of the hearing, denied most of the allegations of the complaint. It further alleged as an affirmative defense that the members of the International had engaged in force and violence and that the Tri-State Union had been dissolved and was not at the time of the answer in existence, and further stated "respondents are informed and believe that since the dissolution of said Tri-State Metal Mine & Smelter Workers, the A. F. of L. had formed a labor union of mine, mill, and smelter workers in this district, known as the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, and respondents are advised that they have no legal right to interfere with same."

Pursuant to notice, a hearing was held in Joplin, Missouri, from December 6, 1937, to April 29, 1938, before William Ringer, the Trial Examiner duly designated by the Board. The Board, the International and the respondents were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties.

During the course of the hearing, on charges duly filed, the complaint was amended to add as a further cause the discharge of John R. Sheppard, acting director of research for the Eagle-Picher Lead Company, hereinafter called the respondent Lead Company, for the reason that he had refused to force the respondents' employees working under him to join the Tri-State Union. The respondents filed an answer to the amendment denying that they had engaged in the unfair labor practices as alleged. Further from time to time during the course of the hearing, the complaint was amended to add the names of various employees alleged to have been discriminatorily discharged to the list contained in the complaint. On motion of counsel for the Board other names of employees alleged to have been discriminatorily discharged were withdrawn and the complaint as to such employees was dismissed by the Trial Examiner without objection. Concerning the motions to add to the complaint names of employees alleged to have been discriminatorily discharged, the Trial Examiner either reserved decision or granted them. Testimony of added claimants as to whom decision was reserved was received, and the Board hereby grants the motion to add the names of such employees to the complaint.

During the course of the hearing, counsel for the Board sought to establish that the Tri-State Union had not actually dissolved, and

that its purported successor, the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, herein called the Blue Card Union, was virtually identical with and a continuance of the Tri-State Union. The Trial Examiner reserved ruling on the issue of identity between these two unions, and the respondents filed an affidavit of surprise on the ground that the issue was not within the limits of the complaint. Subsequently, the Trial Examiner overruled the respondents' objection to the admission of evidence on this issue. The complaint alleges that "at no time . . . did the respondents disassociate themselves from and disestablish" the Tri-State Union and that at all times since July 1935 the respondents have required membership in said Union.² In their answers and amended answers, the respondents, as stated above, affirmatively alleged the dissolution of the Tri-State Union and its replacement by the Blue Card Union. We hold that the pleadings raise the issue of the continued existence of the union alleged to be dominated and supported by the respondents, and the ruling of the Trial Examiner, admitting evidence on the continuance of the Tri-State Union under the name of the Blue Card Union, is hereby affirmed.³

At the close of the Board's case, and again at the conclusion of the hearing, the Trial Examiner denied the respondents' motions to dismiss the complaint. These rulings are hereby affirmed. During the course of the hearing, the Trial Examiner made various rulings on other motions and on objections to the admission of evidence. We have reviewed the rulings of the Trial Examiner and find that no prejudicial errors were committed. The rulings are hereby affirmed. Counsel for the respondents, for the Board, and for the International argued orally before the Trial Examiner at the close of the hearing. The respondents also filed a factual brief relating to each employee alleged to have been discriminatorily discharged.

Pursuant to an order issued by the Board directing the Trial Examiner to issue an Intermediate Report, the Trial Examiner, on August 31, 1938, filed his Intermediate Report, copies of which were duly served upon all the parties. The Trial Examiner found that the respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act. He recommended that the complaint be dismissed in so far as it alleged that the respondents had on May 8, 1935, locked out their employees; or that the respondents had refused to bargain collectively with the International Union, or that certain employees, including John R. Sheppard, had been dis-

² The complaint did not allege any violation of Section 8 (2) of the Act.

³ Since the Trial Examiner ruled on the objection on December 9, 1937, and the hearing continued until April 29, 1938, the respondents had full opportunity to meet the issues raised.

criminatorily discharged or discriminatorily refused reinstatement. The Trial Examiner's recommendation for the dismissal of the complaint in so far as it alleged discriminatory discharge or refusal to reinstate pertained in general to the following categories of employees: (1) those employees who had been convicted by military court of participation in a riot;⁴ (2) those employees who had been convicted or indicted for other violation of law;⁵ (3) those employees who were engaged on May 8, 1935, the time of the strike, in occupations which at the conclusion of the strike had been abolished;⁶ (4) those employees who either before or after the strike had filed suits or made claims against the respondents for compensation for lead poisoning, silicosis, or other disabilities;⁷ (5) those employees who had stated at the hearing that they had been unwilling at all times to return to work with the respondents unless the respondents complied with certain conditions demanded by the International;⁸ (6) those claimants who were not employees of either of the respondents on May 8, 1935, the date of the strike;⁹ (7) those employees named in the complaint who did not testify at the hearing;¹⁰ and (8) those

⁴ These employees were John H. Bankhead, Elmer Dean, James R. Hensley, Darrell L. Largent, Carl D. LaTurner, Walter R. Overstreet, Wesley M. Qualls, Ted Schasteen, William F. Sowder, William L. Webb, and Raymond Williams.

⁵ These employees were Jess Kitch, Darrell L. Largent, and William L. Webb.

⁶ These employees are Harry C. Beyer, Tom W. Black, Roy Boyd, Paul M. Brooks, George W. Clark, Roy A. Cottongin, J. C. Dodson, John E. Freeman, Henry T. Hamilton, James R. Hensley, Oliver R. Hiatt, Vivian C. Hiatt, Jess Kitch, Carl D. LaTurner, Ray McIntire, William T. Mathews, Charles T. Thoades, Lewis Alfred Rice, Clarence Rice, Byron Warmack, Harlan B. Waughtal, Dorsey J. Whitlow, Raymond Williams, James E. Wilson, William Young, William Henry Cagle, Recie F. Jones, William Charles LaTurner, Earl E. Martin, Richard W. Murray, Eugene R. Overstreet, Arthur N. Puckett, Virgil Spiva, Raymond N. Spuriock, Floyd A. Williams, Paul Hollingsworth, Jay O. Jones, John G. Warren, Nick Bratz, H. E. Bridges, D. G. Creason, Lewis DeWitt, N. J. Pettit, James Orvis Bryant, Guss Cooper, Luke A. Griffith, Burton V. (Ben) Kearney, W. E. Bond, A. F. Bruce, Raymond F. Burgett, Clifford Doak, Fred Foster, W. S. Fulkerson, G. Marion Headley, Albert Otis Plummer, Robert M. Ransom, Harry Elmer Ridgway, Elmo A. Treece, and Ora Williams. The Trial Examiner also did not recommend reinstatement and limited back pay to a period ending June 30, 1936, in relation to the following employees who had been employed at the Bend-Carl Mine, which was sold by the Eagle-Picher Mining & Smelting Company on June 30, 1936: Elmer E. Browning, Archie Lee Bunch, Calvin Davis, Jake C. Emerson, Everett J. Faries, Henry L. Freeman, J. D. Hughes, John R. McCormick, W. C. Novak, Albert M. Rigg, Charles E. Van Kirk, William N. Van Treece, and P. L. White.

⁷ These employees were Orven E. Blinzler, Roy Bray, Elmer Dean, Orley Dodd, Walter C. Jewell, Clarence R. Loflin, George W. White, Leroy Berry, Loman Brown, Pleas M. Duncan, Oliver A. Hiatt, Jay O. Jones, Jess Kitch, Carl LaTurner, William Thomas Mathews, Clyde E. Schroeder, Clabe E. Brown, and James E. Webb.

⁸ These employees were John A. Bassett and Millow Ferguson.

⁹ These employees were Leonard B. Anderson, Leroy G. Berry, Ernest K. Bogle, Clabe Brown, Winth Jervis, Clayton Johnson, Mammal F. Jones, Charles C. Owens, Joe A. Reece, Tom Reece, Albert M. Rigg, Clyde E. Schroeder, Orville Stever, and Elmer A. Tinkler.

¹⁰ These employees were Laurel Ashworth, George M. Bankhead, Earl Bartlett, Tom Bogle, Basil Bradshaw, W. T. Brown, W. W. Brooks, Don Cassell, Jim Chatman, William Clark, Raymond Connor, L. W. Countryman, Crabtree, Claib' Crook, G. C. Dale, John Devereil, John P. Delson, C. O. Emerson, J. W. Fitzgerald, Harvey Freeman, Thomas Freeman, James A. Gorman, W. L. Hannon, Ralph Harlow, B. E. Hiatt, W. F. Hobbs, Z. T. Hobbs, Jack Hodson, Joe Hodson, R. D. Hollingsworth, Jesse Horton, Dan Huest, Loyal Henderson, Claude Jones, Frank Jones, Ray Jones, F. L. Jones, Charles C. Jones, Jack Labelle (La-baugh), Richard Lawyer, Ernest L. Lewis, George W. Lewis, Jess E. Lewis, Samuel L. Lipps, Hiram Little, Louis Luten, Floyd E. Mallatt, C. Martin, E. J. Mooney, Horace G.

who were not in good health and capable of working for the respondents at all times after May 8, 1935.¹¹ The Trial Examiner recommended that the respondents cease and desist from their unfair labor practices; reinstate with back pay certain employees; give back pay without reinstatement to other employees; cease and desist from encouraging membership in the Tri-State Union, the Blue Card Union, or any other labor organization; cease and desist from discouraging membership in the International Union; and post appropriate notices, including a notification that a contract between the Blue Card Union and the respondents is null and void and of no legal effect whatsoever.

Subsequently, the respondents and the International filed exceptions to the Intermediate Report. Pursuant to notice served on the parties, a hearing for the purpose of oral argument was held on December 12, 1938, before the Board in Washington, D. C. The International was represented by counsel and participated in the argument. Counsel for the respondents appeared and requested that, owing to time limitations, the respondents be permitted to incorporate as their oral argument before the Board the oral argument made and transcribed before the Trial Examiner following the hearing. This oral argument of the respondents' counsel has been duly incorporated into the record and has been considered by the Board. Thereafter the International filed a brief in support of its exceptions. Counsel for John R. Sheppard also filed a brief in support of exceptions to the Trial Examiner's recommendation that the fourth cause of complaint, alleging Sheppard's discriminatory discharge, be dismissed.

The Board has considered the exceptions of the respondents and of the International to the Intermediate Report, and in so far as they are inconsistent with the findings, conclusions, and order set forth below finds them to be without merit.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

1. BUSINESS OF THE RESPONDENTS

The Eagle-Picher Lead Company, herein called the Lead Company, is an Ohio corporation, incorporated in 1867, with principal offices

Murphy, Dellos Neeley, M. O'Dell, L. D. Rice, Claude W. Rowland, Burl Russell (Dead), R. B. Smith, W. R. Spencer, Clarence Stevenson, E. W. Thumure, Clarence Thomas, Truman Thomas, Floyd C. Titus, John Warren, Arthur E. Webb, Fred G. Winner, H. E. Wisdom, Davis Worthan, and R. Ira Young.

¹¹ These employees were Otto Anderson, Leroy G. Berry, Elmer Belk, Lomal H. Brown, Claude Dalton, Oliver R. Hiatt, Jay O. Jones, Reele F. Jones, Clarence R. Loflin, William Thomas Mathlewa, James M. Roper, William N. Van Treece, James E. Webb, and Floyd N. Woolker. The Trial Examiner also found that certain employees were incapacitated for limited periods between May 8, 1935, and the date of the hearing.

at Cincinnati, Ohio. Its capital stock was issued at a par value of \$18,555,400. The Lead Company is engaged in the mining of lead and zinc ores, the smelting and refining of lead and zinc, the manufacture of products from lead and zinc, and lead and zinc byproducts, and the marketing of such products.

The Eagle-Picher Mining & Smelting Company, herein called the Mining Company, a Delaware corporation, is a wholly owned subsidiary of the Lead Company and was incorporated in Delaware in 1930. It handles the principal mining and smelting activities of the respondents. The Eagle-Picher Sales Company, not here involved, has since 1934 marketed the products of both the Lead Company and the Mining Company. It is a subsidiary of the Lead Company, and has offices in the principal cities in the United States.

The Lead Company has manufacturing plants at Joplin, Missouri; Hillsboro, Illinois; Argo, Illinois; Chicago, Illinois; Cincinnati, Ohio; Newark, New Jersey; and a smelting plant at East St. Louis, Illinois. The Mining Company owns, leases, and operates lead and zinc mines in the Tri-State District, consisting of southeastern Kansas, northeastern Oklahoma, and southwestern Missouri. These enterprises are involved in the present proceeding. It operates a lead smelter at Galena, Kansas, a zinc smelter at Henryetta, Oklahoma, and a Central Mill near Picher, Oklahoma, where lead and zinc ores are smelted and refined. The Mining Company also has oil and gas wells in Oklahoma; a mine in Arizona, which produces coal, silver, lead, and zinc; coal mines in Arkansas; and barytes deposits in Missouri. The enterprises named in the last sentence are not here involved.

For the fiscal year ending December 31, 1936, gross sales of the respondents totaled \$20,883,413.50 of which \$16,704,138.52 represented sales by the Lead Company, and \$4,091,171.42 represented sales by the Mining Company and subsidiaries.

During the period between March 31 and October 1, 1937, the Mining Company produced at its Central Mill near Commerce, Oklahoma, 8,300 tons of lead concentrates, all of which were shipped to points outside the State of Oklahoma. The major portion of this total was shipped to the Mining Company's smelter at Galena, Kansas. During the same period the Mining Company produced at its Central Mill approximately 55,000 tons of zinc concentrates, of which approximately 21,600 tons were shipped to destinations outside the State of Oklahoma. Of the 28,400 tons of zinc concentrates shipped from the mill to points within the State of Oklahoma, approximately 50 per cent were moved over the St. Louis & San Francisco Railway Company by way of Baxter Springs, Kansas. In the same period the Mining Company shipped to its smelter at Galena, Kansas, from

points outside the State of Kansas, approximately 24,100 tons of lead, lead concentrates, and secondary lead-bearing materials. It produced at the Galena, Kansas, smelter approximately 28,900 tons of marketable commodities, of which approximately 20,900 tons were shipped to the Lead Company at points outside the State of Kansas, while 3,700 tons were shipped to other purchasers outside the State of Kansas. During the same period the Mining Company shipped to its smelter at Henryetta, Oklahoma, from points outside the State of Oklahoma, approximately 3,100 tons of zinc, zinc concentrates, and secondary zinc-bearing materials. At its Henryetta smelter the Mining Company produced 14,700 tons of marketable commodities of which about 160 tons were shipped to the Lead Company outside the State of Oklahoma, and approximately 14,540 tons were shipped to other purchasers outside the State of Oklahoma. The Mining Company's mills are the principal mills in the Tri-State area and mines owned by others in the area ship or otherwise deliver their ores and products to the Mining Company's mills. Crude ore is hauled to the Central Mill in Oklahoma from mines in Kansas and Missouri. The percentage of such ore so delivered to the Central Mill varies from day to day. Not less than 35 per cent of the ore milled at the Central Mill originated from points outside the State of Oklahoma during the period from March 1 to October 1, 1937.

The Lead Company between March 31 and October 1, 1937, produced at its Joplin, Missouri, smelter about 12,916 tons of commodities, 11,447 tons of which were shipped to points outside of Missouri.

The operations of the Mining Company and the Lead Company during said period from March 31, to October 1, 1937, are characteristic of each 6-month period of operations by said companies during the years 1935, 1936, and 1937. During these years there existed a written contract between the Mining Company and the St. Louis & San Francisco Railway Company whereby the Mining Company was given the right to, and did, operate trains on the tracks of the said railroad between Webb City, Missouri, and the Central Mill in Oklahoma for the purpose of transporting crude ore owned by the Mining Company.¹²

II. THE ORGANIZATIONS INVOLVED

The International Union of Mine, Mill & Smelter Workers Locals Nos. 15, 17, 107, 108, and 111, are labor organizations affiliated with the Committee for Industrial Organization, herein called the C. I. O.

¹² In *Daniel M. Lyong, et al. v. The Eagle-Picher Lead Company, et al.*, 90 F. (2d) 321 (C. C. A. 10th, 1937), the United States Circuit Court of Appeals for the Tenth Circuit held that the respondents here involved were engaged in interstate commerce.

In 1935 these locals were affiliated with the American Federation of Labor. They admit to membership all persons working in mines, mills, and smelters, who are not in executive positions. Foremen are admitted as associate members only. The jurisdiction of the locals corresponds roughly to various geographical areas in the Tri-State District. Their membership is not restricted to employees of the respondents, but includes persons employed by other mines, mills, and smelters in the Tri-State District.

The Tri-State Mine, Mill & Smelter Workers Union is an unaffiliated labor organization organized on or about May 27, 1935. It admits to membership all white males over 18 years of age who have previously worked in any capacity in the lead or zinc mines, mills, or smelters in the Tri-State District. The constitution of the Tri-State Union does not limit its members to non-executive employees. The Tri-State Union also admits to membership local merchants and other non-employees in the district. Since its inception, the Tri-State Union has been known as the Blue Card Union.

The Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers is a labor organization organized in 1937.¹³ On April 24, 1937, the American Federation of Labor, herein called the A. F. of L., granted Federal union charters to various locals in the Tri-State area and on June 16, 1937, the Blue Card Union was officially organized as an A. F. of L. affiliate. It admits to membership only mine, mill, and smelter workers in the district.

III. THE UNFAIR LABOR PRACTICES

A. *The respondents' managerial and administrative structure; powers to hire and fire; the respondents' responsibility for activities of supervisory employees*

Since in the course of events described below leading parts were played by certain of the respondents' employees for whose actions the respondents urge that they are not responsible, it is necessary at the outset to describe the respondents' administrative structure. The highest managerial officers of the respondent Lead Company and its wholly owned subsidiary, the respondent Mining Company, are situated in Cincinnati, at the respondents' central business offices. Except indirectly, these individuals are not here involved.

The respondents' chief executive officer in the Tri-State area is George Potter, vice president of the Mining Company and general manager of the mines. Although nominally connected only with the Mining Company, Potter was during the strike and at least until September 1935 in charge of the labor relations of both respondents.

¹³ The circumstances of its creation are described more fully below.

Chief officer of the Lead Company in the Tri-State area was *Leonard Vaughn*, general manager of the respondent Lead Company's Joplin plant. Vaughn testified that he discussed labor matters with Potter during the strike and that he also supervised labor relations at the Joplin plant during the period in question. Jointly with Vaughn, *Walter George* was in charge of personnel at Joplin. Applicants for employment at Joplin are initially routed through George. *G. C. (Clint) Niday* was general superintendent of the Mining Company and in charge of the policies at the mines and the Central Mill. *Raymond Hallows* was general manager of the respondent Mining Company's Galena smelter. He had power to hire employees at that plant. Actual initial hiring at the Galena smelter was done by Joe Newby, its personnel manager and superintendent. Assistant secretary of the Mining Company, in charge of conducting compensation litigation for both respondents, and personnel manager of the Mining Company's mines and Central Mill, was *John Campbell*, who had charge of the personnel records at the mines and smelters and has ultimate power over the issuance of rustling cards.¹⁴ He also supervises labor relations at the mines and Central Mill.

The respondents apparently do not contend that the individuals named above are not executives or officers of the respondents. It is clear that these men guide the policies of the respondents in the Tri-State area and are in active charge of the respondents' enterprises there. We hold that the respondents are bound by the statements, conduct, and activities of these men.

The respondents contend, however, that only the men named above have any power over personnel and that no others have power to hire. This contention is based on the system of personnel management employed by the respondents in the Tri-State area. In general, the respondents claim that all candidates for work must first apply at the respective employment offices of the respondents, answer questions and submit to physical examinations. If the examinations are satisfactory, a rustling card¹⁵ is issued to the applicant. Without a rustling card, the respondents contend that no applicant may work for them. It is evident that such is, in general, the system in force. Nevertheless, it is clear that it is not always followed with strict formality. Testimony of various employees establishes that superintendents, ground bosses and foremen do, on occasion, put men to work without a rustling card, and shortly thereafter send the worker to the office for a rustling card.¹⁶

¹⁴ See immediately below for a description of the rustling card system.

¹⁵ Also known as hustling or work cards.

¹⁶ The ground boss may himself send the employee to the office with an order for a rustling card. Such an order does not appear to be anything more than a recommendation that a card be issued.

In any event, we find that the rustling-card system is not such that it deprives lesser supervisory employees in the respondents' official hierarchy of all power over hiring and discharging. Issuance of rustling cards at the offices, although ordinarily a condition precedent, is nevertheless merely a preliminary step, to obtaining employment. Campbell testified and we find that he or his office issued cards without first ascertaining whether a job was available, and that it was customary to issue more rustling cards than the number of actual employees necessary.¹⁷ After the card is issued, other supervisory employees participate in personnel management by choosing candidates, by assigning work, by making recommendations and by discharging. We turn briefly to the testimony adduced in relation to this issue, and to the actual functioning of these individuals.

Superintendents. Norton Ritter was superintendent of the Mining Company's South Side and Big John Mines. Simeon Clark was superintendent in charge of the Bendelari mine as "assistant" to Niday. Walter Frudenberg was superintendent of the Mining Company's Central Mill. Clark testified that he had power to give employment if there was a vacancy. Ritter testified that the employment of labor and supervision over labor problems at the South Side and Big John mines rested with Campbell in the first instance and thereafter with himself. Concerning Ritter's powers, the following colloquy ensued:

Q. (By the respondent's counsel): "Both before and after the strike, did you or anyone else have the right to go out and hire men?"

A. If they had a rustling card, we could."

Frudenberg testified that once rustling cards were issued, he assigned men to work. He admitted on cross-examination, however, that "I have something to do with the hiring and the firing of men, but that has nothing to do with any employment cards," and that "If a prospective candidate came to me for a job and he had the requirements to fill a certain job, I would send a recommendation into our office for an employment card." When questioned by Board's counsel concerning what he had "to do with the hiring and firing of men," Frudenberg replied "That answers it. I have the hiring and firing of men." Finally, Frudenberg testified that he had full powers to discharge without first consulting the office.

We find that the respondents' superintendents have power to assign men to work, have power to participate in the hiring of men and

¹⁷ Leonard Vaughn and Walter George testified that the system differed at the Joplin plant, where only so many rustling cards were issued as jobs were available. George admitted, however, that he "might have asked the foreman if this man [i. e. an applicant] would be all right for this job." The individual supervisory employees at Joplin are discussed below.

have full power to discharge. We further find that their powers are such as to make the respondents responsible for their statements, conduct and activities.

Ground bosses. The chief working foreman of a mine is known as a ground boss. His immediate superior is the superintendent. The following are ground bosses of the respondent Mining Company: *Newt Keithley*, Southside mine; *William DeWitt*, Tulsa-Quapaw mine;¹⁸ *Joe Pruitt*, Bendelari mine;¹⁹ *Oscar Bailey*, Tom Brown and Grace B. mines; *L. C. ("Rats") Marcus*, Ohimo and LaSalle mines; and *Ray O'Dell*, Mary N. Beck mine. Mike Evans, who was himself an operator and had long been engaged in mining in the Tri-State area, testified that a ground boss generally had power to hire and discharge in the district. Clifford Doak, an employee of the respondent Mining Company, testified that DeWitt, his ground boss, had power to hire and discharge, and that when he was hired, he had to get an order from his ground boss in order to get a rustling card. Mack Hanks, an employee of the respondent Mining Company, testified that he had seen Newt Keithley, his ground boss, fire employees and in general give orders at the mine. John Warren testified that Oscar Bailey, his ground boss, put and refused to put men to work when they presented rustling cards, and gave orders. James Thompson and Raymond Burgett testified that after the strike, when they applied for work at the respondent Mining Company's main office, they were directed first to obtain an order from their ground bosses. Oscar Bailey testified that as a ground boss he "assisted" in the hiring and discharging of men.

We find that the respondent Mining Company's ground bosses have substantial powers to hire, discharge, assign and direct work, and are supervisory employees whose statements, activities, and conduct are binding upon said respondent.

Foremen and other supervisory employees. The respondent Mining Company's foremen include "*Os*" Russell, shift foreman of the Jumbo furnaces at the Galena smelter with 12 or 14 men under him;²⁰ *James Shaw*, Jumbo furnace foreman at the Galena smelter; "*Dave*" Shaw, yard foreman at the Galena smelter with 15 to 30 men under him; *Fred. DeMier*, foreman or superintendent of the flotation department at the Central Mill; *Carl Juergens*, shift foreman at the Central Mill; *B. L. Geddes*, superintendent of the white-lead department at the Galena Smelter; and *James Sweet*, Jumbo furnace foreman at the Galena smelter. The respondents contend that these men

¹⁸ DeWitt was ground boss at the time of the strike, and later became foreman and "cokey herder."

¹⁹ Pruitt died late in 1936 or early in 1937.

²⁰ The Trial Examiner excluded certain conversations between employees and Russell or other foremen and admitted others as original evidence only. Although we here observe the limitations placed upon such evidence, we believe that the rulings were erroneous.

have little or no authority. Campbell testified that shift foremen,²¹ and other foremen named above, have no power to hire employees. Subsequently, however, Campbell admitted that a shift foreman could "place him on his crew—that is, as to what work to do." He further admitted that every individual who had a rustling card did not necessarily have to go to the superintendent but could go direct to the foreman, who could forthwith put the man to work; and that he knew of no instances where a superintendent failed to dismiss an employee whom the shift foreman recommended for dismissal.²² Testimony other than Campbell's indicates that foremen have supervisory powers of a substantial nature. The evidence shows that the Mining Company, at least at the Galena smelter, employed "extras" who waited at the gate for employment. Whether or not they received employment each day depended on whether they were chosen by a foreman. Pleas Duncan, a witness for the Board and a former acting foreman at the time of the strike, testified that he discharged men without consulting his superiors and on occasion hired men who had not yet obtained rustling cards. Raymond Hallows, a witness for the respondents and manager of the Galena smelter, testified that "A foreman has the option of picking his own men." Although on direct examination, Frudenberg testified that he did not allow his foremen to assign men to work, on cross-examination he stated that an applicant had "to come and see" Frudenberg or "come recommended" by a foreman. Finally Joe Newby testified that a foreman "has his choice over the entire extra board" and further had power to decide whether to make an extra a permanent employee.

A "cokey herder" holds a position at the mines somewhat analogous to foremen at the Central Mill and Galena smelter. He is the foreman of the shovelers and supervises their work. The ground boss is his immediate superior. The evidence shows that a cokey herder is generally the person at the mine who informs miners that they are no longer needed; that he can report a miner to the ground boss for unsatisfactory work; that he gives instructions to the men under him; and that on occasion he hires men with rustling cards without first consulting the ground boss.

Foremen at the Lead Company's Joplin plant include *Allen Best*, head of the metal department with 30 men under him; *Roy Wood*, foreman in the Joplin plant after November 1, 1935; *Fred Clearman*, day foreman of the wool department; *Alton Jones*, in charge of the insulation department; and *Foster Mays*, foreman of the electrical department with 5 men under him. The respondents urge that because of the difference in the hiring system at the Joplin plant,

²¹ Not all individuals named above are shift foremen.

²² Employees generally considered such foremen as "bosses" and so referred to them at the hearing.

special considerations, apply. Vaughn testified that at Joplin, there is no "candidating" at the gate, that the foremen do not pick their men but notify the office of vacancies, whereupon Walter George hires the men. Nevertheless, the evidence shows that the foremen have substantial powers. George admitted that the rustling-card system limited the right of others than himself only in relation to hiring. George, as personnel manager, had little to do with lay-offs or discharges; the other supervisory employees below him exercise the power to discharge and simply notify George of the fact after it is accomplished. Alton Jones testified that the chief function of a foreman at the Joplin plant was "constant supervision" over the particular department in his charge. Moreover, Vaughn testified that foremen had power to recommend men to be hired.

It is evident that Campbell, the respondents' chief witness on this issue, attempted in his testimony to limit the powers of these employees more than the actual practice justifies. In 1936, in the course of the respondents' suit to enjoin the Board's proceeding against the respondents for alleged unfair labor practices, Campbell testified in the Federal District Court "that he was familiar with the hiring of labor by complainants [respondents]; that each foreman hires his own crew. The foremen consist of the various men in charge of the various departments; that there were about fifty-three men in the Tri-State District who employed labor and that these fifty-three men are all supervisors of the various departments and that if they were brought to a hearing of the National Labor Relations Board it would be necessary to shut the properties down; that complainants never operated a property without a foreman: . . ." ²³ Campbell was confronted with this record of his prior testimony and admitted he so testified. On redirect examination, Campbell stated that in using the word "hire" in the injunction proceeding he meant "placing a man or assigning him to work on his crew only" and that the power of ground bosses and foremen to discharge was limited only to discharging them "from the particular job."

On all the evidence, we find that the foremen and other employees discussed in this group are supervisory employees of the respondents, represent the management in dealing with ordinary workers, have power to recommend hiring of employees and to assign men to work, have power to choose men for work, have power to supervise the

²³ This summary of Campbell's testimony is quoted verbatim from the "Statement of Evidence" under Equity Rule 75, in the District Court of the United States for the Northern District of Oklahoma and prepared for review by the C. C. A. 10th. The statement of evidence was signed and stipulated to in accordance with the equity rule by counsel for the Board and counsel for the respondents, and was approved, settled, and signed as a true and complete statement of the evidence adduced at the trial by F. E. Kennamer, United States District Judge. *Eagle-Picher Lead Co. et al. v. J. Warren Madden, et al.* The statement appears in the formal files of the instant case, and is part of the record herein.

work of employees and direct them, and have power to discharge employees. We find therefore that the respondents are bound by the statements, conduct, and activities of this group of employees.²⁴

B. The background of the unfair labor practices; events prior to July 5, 1935; the strike; the back-to-work movement; the organization of the Tri-State Union

Under the impetus of Section 7 (a) of the National Industrial Recovery Act, organization of the respondents' employees, as well as of other employees in the Tri-State area, began in 1933. In 1934 the International had established several locals in the area and had a substantial membership among the respondents' employees. In 1934 and in the early part of 1935, representatives of the International made several efforts to bargain collectively with the respondents. Although early in 1935 some conferences with the respondents and other operators in the district were held, these efforts met with little success, since the respondents were not satisfied that the International representatives were "duly accredited." The respondents through their supervisory employees announced to the International representatives in March and April 1935 that the respondents' policy was an "open shop" one and that they were unwilling to treat with the International as the representative of their employees. No effort was made to ascertain whether or not the International represented a majority of the employees. The respondents posted notices on their bulletin boards announcing that they were willing to meet with any individual or group of employees for purposes of discussing working conditions.

Because the attempted negotiations between the International and the respondents proved fruitless, on or about May 1, 1935, the International conducted a strike vote. Of the 700 International members who voted, over 600 voted in favor of a strike.²⁵ Accordingly, at midnight, or a little before, on May 8, 1935, the International began a strike against almost all the mines, mills, and smelters in the Tri-State District for the purpose of obtaining recognition from the operators, including the respondents. All the mines, mills, and smelters of the respondents were struck. As a result of the strike the respondents' operations, as well as other mining operations in the area, were totally suspended.

²⁴ As stated in footnote 20 above, the Trial Examiner limited the force of testimony concerning conversations with these supervisory employees and admitted such testimony as original evidence only. Since the respondents may have withheld cross-examination or other evidence because of these rulings, we shall limit consideration of such testimony where limited by the Trial Examiner.

²⁵ It is evident that although a great majority of the International members who voted, voted for the strike, such voters did not constitute a majority of all mine, mill, and smelter workers in the Tri-State area.

The complaint alleges that the respondents locked out their employees at some time before midnight on May 8, 1935. The evidence shows that the respondents took certain steps between 10 and 11 p. m. on May 8 to halt their machinery and to close down their plants and mills. However, they had been notified by the International that the strike would become effective at midnight and the steps taken by the respondents²⁸ were simply in pursuance of such notification. The Trial Examiner found that the action of the respondents in closing their mines, mills, and smelters was "a reasonable measure in view of the announced intention of the strike . . . and did not constitute a lock-out of members of the International Union but was a recognition of the existence of a strike and the strike status." The International did not except to this finding. We find that the evidence does not support the allegation that the respondents locked out their employees.

Operations in the Tri-State area were at a standstill for several weeks after May 8, 1935. On or about May 24 efforts began to end the strike and to provide for means whereby the various employees throughout the district would return to work in order that operations could be resumed. These efforts crystallized in the form of a back-to-work movement. The record is not entirely clear concerning the exact source of this movement. It appears, however, that certain employees and small operators held informal meetings shortly before May 24, 1935, to map a campaign for a back-to-work movement. This movement took its first definite form at a meeting of some 28 men during the morning of May 25, 1935, in an open prairie near Quapaw. Among those present were F. W. (Mike) Evans, a mine operator; M. J. Detchemendy, ground boss at Commerce Mining and Royalty Company; Newt Keithley, ground boss at the South Side Mine of respondent Mining Company; William DeWitt, who had been on May 8, 1935, a ground boss at the Tulsa-Quapaw Mine of the respondent Mining Company; Ray O'Dell, ground boss at the Mary N. Beck Mine of respondent Mining Company; and other employees, both supervisory and non-supervisory, in the district. At this meeting those present determined to complete the organization of a back-to-work movement, and steps were immediately taken to accomplish this end. On the afternoon of May 25 the first general back-to-work meeting was held at the Fair Grounds in the city of Miami, Oklahoma. About 250 persons attended. At the Fair Grounds meeting, Evans spoke concerning the possibility of terminating the strike and resuming operations. On May 25 Glenn Hickman, a ground boss for the Black Eagle Mining Company, drafted a

²⁸ At the Joplin plant of the Lead Company, Leonard Vaughn, the general manager, arrived at the plant shortly before midnight and posted a notice reading: "This plant will be closed indefinitely."

back-to-work petition, which was immediately circulated among the employees of the various operators of the district. The petition stated:

We, the undersigned, being dissatisfied with being forced out of work on account of the strike called by the International Union of Mine, Mill & Smelter Workers, and being desirous of returning to our jobs at the mines, mills and smelters hereby disavow the acts of said International Union in calling said strike, and declare ourselves willing to work and agree if the majority of the mines, mills & smelters open and permit us to return to work, that we will to the best of our ability prevent any destruction of your property or harm to your persons, and by signing our names to this petition bind ourselves together to form an organization for the purpose of protecting ourselves and each other from any and all harm or dangers from any organization opposed to returning to work in this district, and further, those of us who have been members of said International Union by signing this petition hereby resign from said International Union and sever all our connections therewith.

Over a period of 2 days, approximately 3,125 names were inscribed on this petition. Meanwhile, on May 26, 1935, a second back-to-work mass meeting was held at the Fair Grounds in Miami, Oklahoma, with approximately 1,500 persons in attendance. Before these persons were permitted to attend the meeting, they were met at the gates and questioned as to their names and prior employment. Present at this meeting were Newt Keithley, Oscar Bailey, and other supervisory employees of the respondents. At this meeting Mike Evans first discussed the plan to form a union to aid in the opening of the plants and mines and to end the strike. A meeting to elect officers of the new union was announced for the following day. On May 27, 1935, approximately 3,000 persons attended the third back-to-work mass meeting at Miami, and the Tri-State Union was there organized.

The progress of the back-to-work movement, however, was marked by considerable violence. Although the respondents in their exceptions state that what violence the Tri-State Union engaged in was due solely to initial provocation by members of the International Union, the evidence fails to bear out the respondents' contention in this matter. It appears that at the back-to-work meeting on May 25 the speakers who urged a return to work were met with considerable vocal opposition on the part of International members. No physical violence occurred. W. W. Waters, a witness for the Board, who was labor relations representative for the Governor of Oklahoma, was present in the Tri-State area throughout this period. He testi-

fied that he saw no International violence in May, and that he had various conversations with superintendents and foremen of mines and received no complaints of violence committed by the strikers. On May 27, Mike Evans, who had by this time become the leader of the back-to-work movement, was met at his headquarters by members of the International, who resented the attempt to break the strike. Although the precise details of the occurrence are not clear from the record, it appears that some International members tried to prevent Evans from attending a back-to-work meeting and that Evans called Ely Dry, the local sheriff, for aid. In attempting to aid Evans, Dry was assaulted by certain members of the International. On the same day, those persons interested in the back-to-work movement staged their first "pick-handle" parade. Orville Stever, an employee, testified that he went to the Miami Fair Grounds' meeting on May 27, 1935, and found that those present were "milling around and had short pieces of steel and guns and clubs." Robert Tutkall, a superintendent for the Commerce Mining and Royalty Company, warned Stever to leave the meeting since he was a member of the International. At this meeting those attending were informed that they could obtain pick-handles stored at a neighboring schoolhouse. Waters testified that at this meeting Joe Nolan, who was an operator in the district at this time, addressed the crowd and stated, "We are going back up to Picher and take back something that belongs to us. I want you all to load into your cars and go up to Picher." The men were then driven in cars to the main street of Picher where they assembled on foot in a column with Joe Nolan in front and they marched into Picher "three or four thousand strong."

As a result of the back-to-work meetings and in order to give concrete form to the movement, the Tri-State Union was organized at a mass meeting on May 27, 1935. Mike Evans, who admitted that the idea of an organization "may have originated with me," testified that he believed that an organization plan was first decided upon at the first meeting at the Fair Grounds. In any event, on May 27, 1935, the Tri-State Union was formally organized. Immediately prior to this meeting on May 27, articles of association were drawn up by Kelsey Norman, subsequently counsel for the Tri-State Union. The articles were signed by F. W. Evans; Ray Morris, watchman for the Mining and Smelting Company; Glenn Hickman, ground boss for the Black Eagle Mining Company; William DeWitt, ground boss at the respondents' Quapaw Mine; Harold Irwin, ground boss at the Mid-Continent Lead & Zinc Company; M. J. Detchemendy, ground boss for the Commerce Mining & Royalty Company; John Garretson, employed by the Commerce Mining &

Royalty Company; A. O. Jackson, employed by the Childress Lead & Zinc Company; William Anderson, employed by the Commerce Mining & Royalty Company; Lawrence Medlin, engineer for the Childress Lead & Zinc Company; Newt Keithley, ground boss at the respondents' South Side Mine; and Joe Pruitt, ground boss of the respondents' Bendelari Mine. At the meeting on May 27, 1935, these 12 individuals, the signers of the articles of association, were elected as members of the executive committee of the Tri-State Union. The record does not disclose the process whereby these 12 men were chosen as the officers. At the same meeting the constitution and bylaws for the union were adopted.²⁷

The preamble of the constitution and bylaws of the Tri-State Union states:

To unite the metal, mine and smelter workers; to promote their general welfare and advance their interests social, moral and intellectual; to protect their families by the exercise of justice, very needful in a calling so hazardous as ours.

Persuaded that it is for the interests both of our members and their employers that good understanding should at all times exist between the two, it will be the constant endeavor of this organization to establish mutual confidence and create and maintain harmonious relations.

Such are the aims and purposes of the Tri-State Metal Mine & Smelters Union.

The preamble does not mention collective bargaining.

The constitution of the Tri-State Union vests ultimate control in the executive committee, to be a member of which an individual shall have at least five years experience as a vice-principal in the metal mines or smelters in the Tri-State Area . . . and shall have been employed as such in said area for at least three years immediately before his election or have held office in this union.

The constitution also contained a provision relating to the qualifications of officers in subordinate locals:

A subordinate association officer shall have had at least five years experience as a vice-principal in the metal mines or smelters in the Tri-State area, and shall have been employed as such in said area at least three years immediately before his election.

²⁷ The constitution and bylaws were prepared by Kelsey Norman, the attorney whom Mike Evans had suggested. Both Glenn Hickman and Mike Evans refused at the hearing to testify regarding the conversations held at this time with Norman pertaining to the inception of the Tri State Union. Their refusal was based on a claim of attorney-client privilege.

Mike Evans, a witness called by the Board, was vague in his testimony concerning the precise definition of a "vice-principal." He stated that he understood the term applied to anyone employed for 5 years in the mines. It is evident from the record, however, and we find, that "a vice-principal," as used in the constitution and as understood in the Tri-State area, applies only to those employees who are ground bosses or superintendents.

The executive committee immediately chose its officers, and Mike Evans was elected as president. Evans testified that he protested against such a choice since he was an operator. The protest, if any, was apparently disregarded.

The Tri-State Union thereafter rapidly gained impetus. From Campbell's testimony, a vivid picture of the susceptibility of the employees to a movement to return to work, particularly if such a movement was supported by the "bosses," is drawn. Campbell testified:

Conditions with labor, the workmen that were out of work, were becoming desperate. There is not much else in this community on which the working man can live except the mines, and that is practically the support of other industry and business in the district. And the men had been on reasonably low wages and, in fact, very low wages up to the time of the strike on account of very low market prices for concentrates. And being down, being out of work a week or 2 weeks, brought most of them to destitution.

Many witnesses who ultimately joined the movement testified, and we find, that they did so only to avoid extreme want on the part of themselves and their families. The purpose of the Tri-State Union at this time was to break the strike and to get the men back to work.²⁸ In order to fulfill this purpose Mike Evans, president of the Tri-State Union, immediately took several steps to aid in the resumption of operations.²⁹ Evans and the Tri-State Union took over the task of local law enforcement. The record abundantly shows that Evans, with the acquiescence and aid of Sheriff Ely Dry and other law-enforcement officers, distributed deputy commissions to members of the Tri-State Union. Purportedly to protect property, an elaborate organization was set up whereby "squad cars" were sent throughout the area to patrol the highways and the mines. These activities were directed by Mike Evans, with the assistance of Fred Carpenter, the leader of the squad-car group, with headquarters at the Connell Hotel in Picher, Oklahoma, a hotel owned by Evans.

²⁸ The Tri-State Union itself had a policy against striking.

²⁹ Directly after the pick handle parade on May 27, 1935, the Oklahoma State Militia was called into the area.

These squad cars contained four or five passengers, all paid by the Tri-State Union and equipped with guns and other arms. Between 75 and 100 men were on the squad-car pay roll. The record abounds in incidents of lawless violence committed by the squad-car men. These squad cars cruised about the neighborhood, stopping all cars suspected of containing International members, watching houses of International members during the night,³⁰ and even halting the car of Waters, the labor relations representative of the Governor of Oklahoma. Further, the evidence shows that the squad-car men beat up members of the International and brought them to Evans' headquarters at the Connell Hotel where Evans, Carpenter, and local law-enforcement agents sat. The squad-car men on at least one occasion brought in the International members whom they had beaten up with the announcement that they "had some prisoners" for the local agents. On another occasion, an International member was arrested by Ely Dry, the sheriff, and Puss Blanton, a deputy sheriff, brought to the sheriff's office and informed by them that he would be released forthwith if he "pulled away from the International" and stated that an attack on Dry had been authorized by the International. When the International member refused, he was jailed for a short time.

The early organizational activities of the Tri-State Union were confined almost wholly to the activities of the squad cars, to pick-handle parades, and to violence and threats of violence in order to pave the way toward a mass resumption of work. This campaign was financed in very substantial part by the respondents, as described below.

In the early part of June the plan to break the strike and to resume operations was furthered by the negotiation of contracts between the Tri-State Union and various operators, including the respondents. Finally, on or about June 12, the respondents' mines and plants reopened, and by the middle of June, with the exception of the Big John Mine and the Galena smelter, their operations were substantially manned.

The exact reason for the delay in reopening the Big John Mine does not appear from the record. The Galena smelter was not opened until on or about July 17, since the respondents' attempt to reopen it on June 28 failed because of a clash between the International members and armed guards within the smelter. The respondents adduced considerable testimony concerning the violence which occurred on June 28 at the smelter. It is clear that the International planned to and did, on being informed of the contemplated reopen-

³⁰ As described by one member of the International who had been harassed by the squad cars, "There wasn't no sleep them days."

ing of the Galena smelter, engage in mass picketing. It is also clear that on the evening of June 28, members of the International Union fired shots into the smelter. There is evidence, however, that on June 27, the respondent staffed the smelter with approximately 20 guards who obtained arms inside the smelter, and several International members testified that the first shot fired on June 28 was fired from inside the smelter at the International members who surrounded the plant. Among the guards, moreover, was Luther Sons, who, the testimony shows, was a reputed criminal in the area. We do not find it possible to apportion precisely the blame for the violence that occurred in connection with the attempted resumption of operations at the Galena plant. Immediately after the Galena riot, the State Militia of Kansas was called.²¹ As a result of the Galena riot, certain members of the International were tried by the military court and convicted of participation in the riot.²²

C. The respondents and the Tri-State Union

As described above, the respondents through their agents' activity participated in the back-to-work movement and in the initial organization of the Tri-State Union. Of the original signers of the articles of association and of the original members of the executive committee in whose hands was vested the control of the Tri-State Union, three were supervisory employees of the respondents.

At the same time that the Tri-State back-to-work movement was going on, the respondents commenced their own. The evidence is undenied that Norton Ritter, Oscar Bailey, and other supervisory employees toured throughout the district in an attempt to persuade the striking employees to return to work. James C. Thompson, one of the respondents' striking employees, testified that Bailey and Ritter drove up to Thompson's house late in May or early in June in a company truck. Bailey and Ritter told Thompson that the company would soon resume operations, and they inquired whether Thompson was interested in going back to work. Thompson replied that he was not yet ready to return to work, and Ritter told Thompson that if he did not return to work soon he would never again work for Eagle-Picher. Further, Thompson testified, and we find, that Ritter offered to pay Thompson wages if Thompson would take

²¹ It appears from the evidence that arrangements were made for the arrival of the Kansas Militia at some time prior to the International's firing shots into the smelter. The respondents' witnesses all testified, and we find, that no shots were fired by the International Union at the smelter until 9 or 10 o'clock on the evening of June 28. The records of the movements of the Kansas Militia show that the military force had begun its journey to Galena at some time before 9 o'clock on June 28.

²² The Galena riot was plainly not provocation for the armed squad car activities of the Tri-State Union, most of which occurred prior to the riot, and we do not believe that it provoked the pick-handle parade in April 1937, nearly 2 years later.

a company truck and "get men that we know to sign that petition to go back to work like the rest of them."

The respondents also took concrete steps to aid the newly organized Tri-State Union. Although Mike Evans testified that during the period of the organization of the Tri-State Union, he had no contact with the respondents, he later testified that because he found that the local Red Cross was inadequate as a relief agency, he discussed the matter with the local businessmen and operators, including the respondents. Evans early in June conferred with George Potter, the vice president of the Mining Company, who was in charge of labor relations at the Mining Company and at the Lead Company during the strike. At this conference which took place in the Mining Company office, Potter expressed his willingness to help Evans and to furnish money. Potter arranged for the granting of credit to the Union by the Security Bank & Trust Company of Miami, Oklahoma, whose vice president, Charles Neal, was the owner of mining properties in the district. Evans was not clear on the precise arrangements concerning these contributions. It appears, however, that Neal instructed W. P. Howard, the cashier of the Security Bank & Trust Company, to grant the Union funds when and as requested by Evans. Potter had previously assured Evans that the credit would be taken care of. During the month of June 1935, \$15,000 was withdrawn from this bank and paid to the Tri-State Union under this credit arrangement. On various occasions in June, Evans and Hickman, as secretary of the Union, executed demand notes to the bank for substantial amounts, and the amount of the note in each instance was paid by the bank to the Union. Evans could not recall whether the notes had been repaid or what had become of them. Howard, the cashier of the bank, similarly could not recall what had happened to the notes. No record of the transactions was kept either by the Union or by the bank. However, either on the day of withdrawal or the following day, remittance in full for the amount withdrawn was received by the bank by check from the respondent Mining Company drawn on a bank in Kansas City. The evidence shows that during the period of organization in June and July, the Tri-State Union expended large sums of money for squad cars, and for other organizational purposes. It is undenied that the Tri-State Union collected no dues until the first or second week of July 1935. We find that the respondents contributed before July 5, 1935, \$15,000 to the Tri-State Union by means of the payments to the bank as described above. The respondents do not deny that such payments were made; Potter did not testify at all. Evans testified, however, that Potter had agreed to make the payments solely for purposes of relief and had specified that the money was not to be used for organi-

zational purposes. We do not believe this testimony, and find that no such limitation was imposed. Upon all the evidence, we are convinced that the respondents had knowledge of the general purposes for which the money was to be used, including the "squad car" activities, and we so find. The Tri-State Union financial records show that at least \$5,000 was expended for guards and armed patrols prior to the collection of any dues by the Tri-State Union. This \$5,000 came from the funds supplied by the respondents.

Finally, the status of Mike Evans warrants special attention. Evans was a leading financier in the district. Prior to 1935 he had been interested in and operated various zinc and lead mines, employing a substantial number of employees. In 1935 during the period in question, Evans operated the Craig Mine, employing 35 men. Evans was also owner of the Connell Hotel at Picher, had a partnership selling second-hand steel cable, owned a business building in Picher, owned a night club and a poolroom, and was part owner of the Ford Agency in Picher. He was a member of the Tri-State Ore Producers Association, an association of the producers in the area. As described above, he testified that the idea of organizing the Tri-State Union may have been his.³³ It is abundantly clear from the record that at each of the back-to-work movement meetings at Miami he played a leading part, and also, with Glenn Hickman and Kelsey Norman, was a principal speaker urging those attending the meetings to return to work. He personally rented the building which the Tri-State Union used as its headquarters in Picher, although the rent was paid by union checks.

Not only was Evans thus identified with the business interests in the area, but he was during this period, closely connected financially and otherwise, with the respondents.³⁴

From the Craig Mine, leased from the respondents, Evans sold ore to the respondent Mining Company and was selling such ore at the time of the strike. Further, since 1935, he acquired other mines and leases including the Nesbitt Mining lease from respondents at no cost to himself. For the 3 years—1935, 1936, and 1937—the gross sales of crude ore to the respondents by Evans amounted to over \$385,000. Further, the respondents' financial contributions to the Tri-State Union were made directly through and to Evans. Finally, the record shows that Evans and Potter, the respondents' highest

³³ He also testified that his own employees at the Craig lease had first broached the idea of a back-to-work movement.

³⁴ The respondent Lead Company owned the ground lease, including a short-term cancellation clause, on all property in Picher, and therefore owned much of the property on which Evans conducted his various enterprises.

representative in the area at this time, conferred concerning the problems at hand. Although Evans denied that he had consulted Potter concerning organizational work, it is nevertheless clear that he had close contact with Potter during this period, both in the course of negotiating the financial contribution, discussed above, and in the course of the execution of the contract between the respondent Mining Company and the Tri-State Union. Potter failed to testify, although he was the chief representative of the respondents at this time and although he was the respondents' representative with whom Evans conducted his dealings.

Under these circumstances, we find that Evans was not primarily a representative of the workers, but was rather a representative of the respondents in a design to stamp out the International organization. We further find that Evans acted as agent on behalf of the respondents, among others.

D. The respondents' relations with the Tri-State Union after July 5, 1935; interference, restraint, and coercion

As described in the section immediately preceding, the respondents contributed financial support to the Tri-State Union; assisted the back-to-work movement by sending its supervisory employees out among the striking workers in an effort to persuade them to abandon the strike and their membership in the International; through ground bosses and other supervisory employees, directly participated in and shaped the organization and administration of the Tri-State Union; and attempted to crystallize and make permanent its acts of hostility to the International and its favoritism to the Tri-State by entering into a contract with the Tri-State. This conduct occurred before July 5, 1935, the date on which the Act became effective, and, therefore, did not constitute unfair labor practices under the Act.

When the Act became effective on July 5; however, the respondents in no way altered their course of conduct in order to comply with the Act's requirements or to give to their employees that freedom of self-organization which they had hitherto denied them. On the contrary, not only did the respondents wholly fail to disassociate themselves from the Tri-State Union, and not only did they accept the benefits of their prior interference, but also they took further active steps to continue their efforts to destroy the International and to encourage the Tri-State Union. The continuance of its conduct, illegal on and after July 5, 1935, is here summarized.²⁵

²⁵ The relations between the respondents and the Tri-State Union concerning the hiring and discharge of employees and the subsequent history of the contract as discussed below.

(1) The respondents' financial and other support of the Tri-State Union.

We have found that prior to July 5, 1935, the respondents contributed \$15,000 to the Tri-State Union, and that this money represented the only source of income to the Tri-State Union in the early part of its existence. Although Charles Windbigler, an employee of Evans who subsequently became the Tri-State Union's bookkeeper, testified that a part of the sum purportedly expended for relief was eventually repaid by the recipients of such contributions, he admitted that no records were kept either of this original transaction between the respondents and the Tri-State Union or of the payments³⁶ to and repayments by these workers. Windbigler stated that this money received from the respondents was considered a "subscription" the receipt of which and the payments out of which were not accounted for in the Tri-State Union's balance sheet or financial statements. The evidence shows that in June and the early part of July, the Tri-State Union had many expenses other than for "relief," such as for guards and squad cars described above. In June it had secured the printing of copies of its articles of association. On June 7, it ordered 500 membership cards. It also purchased ledger books and other equipment in June. Evans was vague in his testimony not only concerning the precise dates when these expenses were incurred but the date on which the Tri-State Union first collected dues.³⁷ No dues books, however, were ordered until July 5 and these were not delivered until July 19. Members of the Tri-State Union were informed by its newspaper on August 2, 1935, that "So far . . . none of you have been asked to repay the tremendous expense of getting you back on the jobs," while the newspaper on October 5, 1935, reported that "The [financial] statement which was read by Mr. Hickman does not include several thousand dollars that was spent before the first dues were collected and for which the members would in no way be responsible."

The payments by the respondents to the Tri-State Union did not cease on July 5, 1935. Evans insisted that he drew no money from the "subscription fund" after July 1, 1935. No records were produced by Evans or by the respondents to corroborate this. Contradicting Evans' testimony, W. P. Howard, the cashier of the Security Bank, who participated in these transactions, testified that on July 8, 1935, he gave Evans \$2,500, and that the Security Bank's record showed the receipt of a check from the Eagle-Picher Mining and Smelting Company for \$2,500, drawn on the Commerce Trust Com-

³⁶ Evans testified that he simply drew cash from the bank, sometimes to the amount of several hundred dollars, and distributed it without notation.

³⁷ He estimated this latter date as early in July.

pany of Kansas City and dated July 8, 1935.³⁸ We find, therefore, that the respondents, through the Mining Company, contributed \$2,500 to the Tri-State Union on July 8, 1935.

The record discloses further instances of support to the Tri-State Union after July 5, 1935. Thus it is undenied that at least until November 12, 1935, the executive committee of the Tri-State Union regularly held its meetings during working hours,³⁹ and although the respondents' supervisory employees were members of the committee, their wages were not deducted; that in September 1935, officers of the Tri-State Union were permitted to address laboratory employees on company time and property;⁴⁰ that on a single day in August 1935, Tri-State officers were permitted to collect dues and enroll members inside the gate at the Joplin plant for 8 hours; that company bulletin boards were used for Tri-State Union announcements; that copies of the Blue Card Record, the Tri-State weekly newspaper, were commonly and up to the time of the hearing distributed on company property; that collection boxes were maintained on company property where Tri-State dues payments were made; and that the respondents inserted paid advertisements in the Blue Card Record, the expenses for the printing of which the Tri-State Union did not pay but which were paid by revenue from whatever advertisements the printer could obtain.⁴¹

(2) Participation by the respondents' supervisory employees in the administration and other activities of the Tri-State Union

As described above, the respondents' supervisory employees were active in the formation and initial management of the Tri-State Union. Present at the early back-to-work meetings and other organizational meetings were Newt Keithley, William DeWitt, Ray O'Dell, Joe Pruitt, Oscar Bailey, Carl Juergens, and L. C. ("Rats") Marcus. Of the 12 men who signed the articles of association 3, DeWitt, Pruitt and Keithley, were supervisory employees of the respondents.

No move was made by the respondents, its supervisory employees, or the Tri-State Union to purge the latter organization after the passage of the Act. DeWitt, Keithley and Pruitt remained as mem-

³⁸ As stated above, the Security Bank received checks from the respondents on the same day as or immediately after money was paid to Evans.

³⁹ Evans at first denied that such meetings had occurred on company time. When confronted with the executive committee's minutes his recollection was refreshed and he admitted this fact.

⁴⁰ These incidents are described more fully below.

⁴¹ Windbigler, the Tri-State Union's bookkeeper, could not recall who paid for the first issue of the Union's newspaper, dated August 2, 1935. This issue contained no advertisements. It is evident that other activities of the Tri-State Union were paid for by means other than dues. For example, the minutes of the executive committee meeting of April 26, 1936, report, "Plans for picnic were taken up for discussion. Pres. Evans announced that 3 of the major operators in the field had made offers to bear the expense of the picnic. Pres. Evans to contact the operators tomorrow."

bers of the executive committee of the Tri-State Union. Sometime prior to 1937, DeWitt withdrew from the committee, while in 1936, Oscar Bailey replaced Joe Pruitt. Thus it appears that at least until July 1937, the respondents were represented on the committee by two or three supervisory employees. Ultimate control of the Tri-State Union rested in the hands of this committee by virtue of its constitution which provided:

The Exclusive Management of the Union shall be vested in an executive committee of 12 members; which committee shall pass upon all matters pertaining to the affairs of the Union, and its decision by a majority vote of the committee shall be final and binding.

It is apparent from the evidence that the power of the committee over Tri-State affairs was fully exercised. Thus Jess Thompson, a witness for the Board, who had joined the Tri-State Union in 1936, testified that motions at the Tri-State Union meetings were usually made by members of the executive committee, and that if any rank and file members protested, Kelsey Norman, the Tri-State Union's counsel, told the protesters to "sit down and shut up."⁴²

Not only did the respondents' supervisory employees participate in the initiation and management of the Tri-State Union but, almost without exception, its high ranking employees were members of the Union. Thus John Campbell, personnel manager of the Mining Company and in charge of issuance of rustling cards which entitled applicants to be assigned to work, Frederick Clearman, chief foreman in the wool department at the Joplin plant, Alton Jones, in charge of the insulation division at the Joplin plant, Joe Newby, personnel manager and superintendent of the Galena smelter, Walter George, personnel manager of the Joplin plant, Walter H. Frudenberg, superintendent at the Central Mill, Foster Mays, in charge of the Lead Company's electrical department, Dave Shaw, yard foreman at the Galena smelter, B. L. Geddes, superintendent of the white-lead department at the Galena smelter, James Shaw, foreman at the Galena smelter, John R. Sheppard, head of the research laboratory, and "Rats" Marcus, ground boss at the LaSalle mine, all were members of the Tri-State Union.⁴³ As described above, each of these individuals had at least some power to select employees for work, to assign work and to discharge employees. Most of the individuals

⁴² How persuasive was the control by the operators and "bosses" over the Tri-State Union is indicated by the minutes of the executive committee's meeting on October 30, 1935: "The business of paying members of the Ex. Comm. a specified amount for expense money was again introduced, and the committee voted to pay Ray Morris \$15 per week as his salary as vice-president of the organization. Other members of the Ex. Comm. asked that nothing be paid them until Pres. Evans had conferred with their various bosses to determine their reactions."

⁴³ The minutes of the executive committee meeting of June 30, 1936, report: "President Evans introduced the unfinished business of appointing representatives at the various

named above admitted that they had attended meetings of the Tri-State Union and at least to some extent participated therein. The respondents, however, contend that these supervisory employees joined and participated in the Tri-State Union voluntarily and without the respondents' authorization. Several factors lead us to hold otherwise, although the respondents would not be absolved in any event. Although a few of the supervisors joined at an earlier date, a great majority became Tri-State members virtually simultaneously in August or September 1935. The date of their joining coincided with the period during which the respondents, as described below, exerted pressure upon John Sheppard, acting director of research for the Lead Company, and upon the supervisory and other employees working under Sheppard, to join the Tri-State Union. Further, the reasons assigned by these supervisory employees are not convincing. With a single exception, none of them had ever been members of any union before. Walter George testified that he joined because "it was just a family proposition." Oscar Bailey asserted that he joined because he "wanted to see the men go back to work" and "the membership of the union increase." Walter Frudenberg testified that he joined in August in order to assist the back-to-work movement, and that by joining "I was adding my moral and little financial support." By August, as described above, the back-to-work phase of the Tri-State Union had long since successfully concluded. "Rats" Marcus explained that he joined in August because "I felt that that was my place to do it; the back-to-work movement, I wanted to work and I figured that was about the only way a man could get to work." Again, Marcus did not join until sometime after the back-to-work movement. Finally, that the membership of these individuals was not wholly spontaneous is indicated by the fact that, again almost without exception, they left the Tri-State Union in April or May 1937. No explanation for the coincidence of dates appears from these witnesses' testimony. The inference is inescapable, particularly in view of the Sheppard incident described below, that the respondents guided the joining and resignation of these supervisory employees, and we so find."

mines and smelters. He liked a suggestion . . . that a ground boss meeting be held with view to establish good will and interest among the members. . . . It was unanimously decided that any plan for appointing representatives would be ineffective unless the ground boss or other boss was first brought in line."

"Of course, even if these supervisory employees' entrance into and participation in the Tri-State Union were not expressly authorized by the respondents, the latter would nevertheless be responsible. "While the evidence showed that . . . the plant manager, and . . . the plant superintendent, repeatedly warned against violations of the . . . Act, . . . They took no effective means to stop repeated violations of the Act. Furthermore with respect to the acts of the supervisory foreman, the doctrine of respondent superior applies, and petitioner is responsible for the actions of its supervisory foremen, even though it had no actual participation therein." *Swift & Company v. National Labor Relations Board*, 106 F. (2d) 87 (C. C. A. 10th).

Not only did the respondents, through its supervisory employees, participate in the general conduct of the Tri-State Union but also in a like manner they were able to and did participate in controlling membership in that Union. The constitution of the Tri-State Union provided that:

The executive committee . . . may determine the requirements and qualifications for membership in the Union; suspend or expel any members for violating any provisions hereof or of the rules and regulations of the executive committee.

As described above, the respondents, through three of their supervisory employees, were represented on this committee. The evidence establishes, further, that this power was exercised. Thus, for example, the minutes of the meeting of the committee on October 30, 1935, report:

Forrest Taylor, who had . . . made application for the Tri-State Union made the mistake of remarking to the clerk in the office that he preferred the International Union to ours. He was brought before the committee where he reiterated his statement. The committee immediately voted to refund his dollar and send him on his way.

Similar minutes of the meeting on October 10, 1935, state:

Those rejected Kern Byrd. There was only one protest against this man, but it was the vote of the Ex. Comm. that he was not to get his card.

At a regular meeting of the Tri-State Union's executive committee on January 14, 1936,

Mr. Evans proposed for vote that all applicants for membership in the Union shall be recommended either by their former employer or by some member of the executive committee. This motion upon being put to vote, was unanimously passed by committee members.⁴³

The record is replete with evidence that by means of this requirement of recommendation, the respondents, through their supervisory employees, exercised the rights of approval or disapproval of Tri-State Union candidates. The minutes of the meeting of the Executive Committee, March 10, 1936, state:

Oscar Bailey [one of the respondents' ground bosses] came before the committee to explain why he thought Van Treece should not have a blue card in the union. Bailey said that Van Treece lived with Forrest a radical international.

⁴³ The Tri-State Union's policy of excluding active International members, and the relation of this policy to the respondents' policies, are described elsewhere.

Ellery Mitts, a former member of the International, testified that he appeared at a meeting of the Tri-State Union in an attempt to join, and that Joe Pruitt, one of the respondents' ground bosses, stood up and announced that Mitts "was no good for anything." Mitts' application was thereafter rejected. Many witnesses testified that they had been directed by the Tri-State Union to obtain approval of their applications from their former superiors and that, on attempting to obtain such recommendations from the respondents' supervisory employees, they had been summarily refused and were unable thereafter to join the Tri-State Union. Included among those of the respondents' supervisory employees to whom Tri-State Union applicants were directed were Oscar Bailey, Walter Frudenberg, Joe Pruitt, Norton Ritter, Allen Best, who was the head of the metal department at the Joplin plant, Joe Newby, Jim Shaw, foreman at the Galena smelter, and Newt Keithley. Almost uniformly, these supervisory employees refused to recommend persons who were International members. We find, therefore, that the respondents, through their agents, passed upon and substantially controlled membership in the Tri-State Union.

(3) The policies of the Tri-State Union: hostility toward the International; intimidation and violence

As described in Section III B above, the Tri-State Union was conceived in order to break the strike and defeat the International. Evans conceded that it was formed "to keep the plants running" and that the preamble of its constitution, in which its purposes are set out, omits any mention of collective bargaining. As recounted by the Blue Card Record,⁴⁶ the Tri-State Union's official newspaper:

The first meeting recorded [was] for the purpose of forming an organization in opposition to the Internationalites. . . . An organization to wipe out an organization was the theme around which a multiplicity of planned detail was built.

An organization to whip an organization. . . ."

In its unrelenting and uncompromising opposition to the International the Tri-State Union never flagged. Indicative of its attitude are typical excerpts from the Blue Card Record:

The head of this Union, his name is Mike,

He and Joe Nolan were in the lead of the Parade with Pick Handles when we broke the strike.

⁴⁶ The evidence shows, and we find, that the Blue Card Record (known for a brief time as the Tri-State Metal Mine and Smelter Worker) stated the official policies of the Tri-State Union and the Executive Committee.

⁴⁷ From "A Brief History of the Tri-State Union," written on its first anniversary, by Glenn Hickman, former ground boss in the area, editor of the Blue Card Record and member of the Tri-State Union executive committee.

Mike said let the yellow bellys stay on relief,
 And drink their dried milk and eat canned beef.
 Because our little Union is just doing fine,
 Let the rest of the strikers stay on the soup line.
 They are losing their cars and selling their hogs:
 For the International Union has gone to the Dogs.⁴⁸

Of the American Federation of Labor with which the International was then affiliated, the Tri-State newspaper observed, "The A. F. of L. is infested with reds and communists,"⁴⁹ and charged that "William Green and his dirty blood-sucking leeches have the interest of only one small minority at heart, namely, the racketeers who run the American Federation of Labor."⁵⁰ The Blue Card Record, after the International affiliated with the Committee for Industrial Organization was equally as violent in its denunciation of John L. Lewis and the C. I. O. The Tri-State Union's hostility toward the International further took concrete form in its persistent policy of excluding from membership all persons suspected of past or present affiliation with the International.⁵¹ As stated in an editorial of the Blue Card Record, dated March 5, 1937, and entitled "Danger From Within":

That spirit [of the Tri-State Union] is rapidly being diluted (perhaps polluted would be a better word) with the trash of the International Union—more recently known as the C. I. O. It is up to us to keep these men out . . . Now, we don't want that kind of man in the Blue card union and we don't propose to have them . . . We know . . . the way to keep it free from the cancerous corruption of red-necked radicals. And this we most emphatically are going to do.⁵²

In similar vein, the Tri-State paper on November 9, 1935, reported that:

President Evans stated that the hunting season was open and that it was time for the blue card members to go hunting for members of the Tri-State Metal, Mine and Smelter Workers Union who still had cards in the old International Union.

⁴⁸ From the Metal Mine and Smelter Worker, October 5, 1935.

⁴⁹ From the Metal Mine and Smelter Worker, August 17, 1935.

⁵⁰ From the Metal Mine and Smelter Worker, November 2, 1935.

⁵¹ The Tri-State Union's constitution provided that membership therein was closed to members of any other organization in a like industry. We recognize that this is a common provision in the constitutions of labor organizations. As described herein, however, the Tri-State Union's exclusionary policy went far beyond ordinary practices and beyond the provisions of its own constitution.

⁵² Since, as found below, membership in the Tri-State Union was a universal requirement in the Tri-State area, the Tri-State Union virtually controlled eligibility for employment in the district.

There have been several reports of this lately, and two members particularly were accused of this.

In his first anniversary speech to the members of the Tri-State Union in May 1936, Evans stated, " . . . we'll pick who we'll work with . . . and if you men do your part in helping us catch these undesirables, we will keep them weeded out."

To keep the "undesirables weeded out" the Tri-State Union devised an elaborate system of passing upon applicants.⁵⁹ The first step was to require immediate resignation from the International and the turning over to the Tri-State Union the applicant's International membership card. If the applicant refused this, he was precluded from further consideration.⁶⁰ Thereafter, the applicant's name was presented to the membership for consideration. Names of applicants were listed weekly in the Tri-State newspaper; if the applicant was suspected of past activity on behalf of, or present affiliation with, the International, his name was followed by an asterisk. "Ballots for protest" were supplied all members. The next step was to parade all applicants across a platform before the membership so that the members could "have a look" at the applicants before they voted. Prospective members were asked whether they had picketed, how long they had been in the International, and whether they would defend the Tri-State Union with pick-handles. Three protests excluded the applicant. Even if he was approved at this stage, the executive committee could thereafter reject him. If rejected, the applicant might renew his application in 90 days if during that period he "stayed away from the International Hall." The minutes of the various locals amply indicate the intense scrutiny to which suspected International members were subjected.⁶¹ Their applications were held over and extensive investigation was made. The

⁵⁹ The policy of requiring recommendation by foremen or other supervisory employees who themselves were members of the Tri-State Union is described above. There is ample evidence to show that such recommendations were intended to be and actually were based on the absence of known International sympathies, and we so find.

⁶⁰ The Tri-State Union after only a short time acquired by this system what a witness described as a "washtub full" of International membership cards. Much of the evidence at the hearing concerning International membership was obtained from International cards which were in the custody of the Tri-State Union.

⁶¹ Typical excerpts from the minutes include: "First business of meeting. Handling rejected applicants . . . (5) Jimmy Darwell [who was rejected] says he picketed only one time. Had three stamps in book" (executive committee, Sept. 18, 1935). "Harvy Vanslyke rejected by Ex. Comm. because he had 4 strike stamps in book" (executive committee, October 23, 1935). "Hallier was reprimanded by F. W. Evans for past International Union activities, and admonished to be very careful with whom he associated in the future" (executive committee, Jan. 21, 1936). "First business of committee to pass on membership applications. All those approved who did not formerly have membership in the International Union" (executive committee, Jan. 28, 1936).

Tri-State Union had on its pay roll special investigators to act on these matters.⁵⁶

The net result of this system is described in an editorial entitled "Hard for the Strikers," in the Tri-State Union paper of August 31, 1935:

With a constitutional requirement of only three blackballs to keep a man out, the Tri-State Union has turned out to be one of the most exclusive organizations in the district.

Nor was the Tri-State Union any more kindly disposed toward the labor movement in general or toward freedom of self-organization. Its editorial pages contained anti-labor cartoons, and it promptly announced that the Act was unconstitutional. It is apparent from the evidence that the Tri-State Union did not even identify itself with the interests of the employees. Thus, in commenting editorially on proposed 40-hour week legislation, the Blue Card Record asked:

Are we going to continue to fight as individual operators for our own greedy interests . . . or are we going to get our heads together and work out some reasonable and fair plan for reducing production in the interests of not only operators, but labor as well.⁵⁷

The Tri-State Union had a rigid anti-strike policy; its constitution provided:

Whenever the General Secretary or Treasurer shall be satisfied that any member of the Union is or has been acting as . . . an inciter of a strike or as a participant therein, which act is or was undoubtedly detrimental to the best interests of the Union itself, he shall immediately enter an order . . . to suspend such member from membership.⁵⁸

Finally, we are unable to find that the Tri-State Union was ever intended to or actually did engage in collective bargaining on behalf of its members. As has been pointed out, the preamble of its con-

⁵⁶ The entire process is described in a Blue Card Record editorial dated March 5, 1937: "A fairly good system of voting on these applicants [i. e. International members] has been worked out . . . An applicant must not only give his name, but also his appearance before the entire local where his true identity is in doubt. Also he must appear in the paper for at least one week before he is eligible for a vote . . . One way they can be stopped from making applications is for foremen of the district to refuse to recommend them."

⁵⁷ Blue Card Record, June 27, 1937. As has already been described, Mike Evans was an operator throughout this period. Joe Nolan, who was vice president of the Tri-State Union, who succeeded Evans as president in November 1937, and who by virtue of his leadership in the pick-handle parades was known as "The Pick-Handle King" was also a mine operator at the time of the strike, employing approximately 25 men at the Luck O. K. mine.

⁵⁸ In a poem entitled "The Racketeer," printed in the Tri-State paper of November 2, 1935, this policy was stated as follows: "The operators have been fair with all their employees: let no bohunks ever dare say 'strike' to blue card boys."

stitution does not mention collective bargaining either directly or indirectly as one of the purposes of the organization. Its constitution does state that the Tri-State Union's executive committee—which we have found to be composed largely of ground bosses and other supervisory employees—"may negotiate contracts." There is no substantial evidence that any such attempts were made. Mike Evans, whom we have found himself to be an operator who was paid \$385.000 by the respondents for his products between 1935 and 1937, testified that at various times the Tri-State Union negotiated in respect to wages with the operators and that "we got a raise for the men every time we asked for it." On the other hand, John Campbell testified that wages paralleled the market price of the ores, and that the increases in wages which occurred were due to the increase in market prices. Further, Campbell, the Mining Company's personnel manager, stated that at no time did he make any inquiry whether or not the Tri-State Union represented a majority. Neither he nor any other officer of the respondents testified that at any time after the Act was passed did the Tri-State Union seek to negotiate with the respondents.⁵⁹ Finally, it is apparent that the leaders of the Tri-State Union did not approve of the practice of bargaining collectively. Thus the minutes of a meeting of the Cherokee Local of the Tri-State Union, held on March 17, 1937, and attended by Mike Evans, Glenn Hickman, treasurer and editor of the Blue Card Record, and Kelsey Norman, report that:

Kelsey Norman spoke at length regarding the purposes of the blue card organization . . . [he] told them if they were not satisfied with working conditions where they happened to be working, to confer with their employer or Mr. Norman⁶⁰ and try to iron things out and not be griping.

In the light of this evidence, we find that the sole function of the Tri-State Union was to act as a counter organization to the International. This was clearly the function intended for it by the respondents.

The record is replete with evidence of the Tri-State's violent methods of fulfilling this function. Chief among its weapons was

⁵⁹ The respondents' estimate of the Tri-State Union is most clearly indicated by Potter's remark to Ernst Berry, International representative, on July 10, 1935. Over a month after Potter had signed a contract with the Tri-State Union, Potter told Berry, "Some day I realize that we are going to have to sign a contract with a bona fide labor organization."

⁶⁰ There is evidence that Norman's interests were not wholly with the employees. In the course of his address to the laboratory employees, described below, Norman was asked "Are your chances of getting a job as a corporation lawyer high?" Norman replied, "An attorney does not seek employment . . . If I should seek employment with a corporation I am inclined to think a corporation would favor me for my work in this organization." In the same address Norman told the employees "I haven't received a penny salary out of the dollar [dues] paid in. I have devoted practically every moment of my time since May 27 to this work."

that of the "pick-handle" parades first introduced on May 27, 1935. As described by Burt Craig, a Tri-State member and former squad-car driver, "a pick-handle is something like a badge" so that anyone carrying a pick-handle was thereby known to be a member of the Tri-State Union. After the first parade on May 27, 1935, threats of pick-handle parades were used constantly against International activities. Thus the Blue Card Record of February 19, 1937, in commenting on the C. I. O. strikes in Detroit, Michigan, contained an article entitled "Hickory Handles Might Turn the Trick," suggesting that the strikers and C. I. O. members could effectively be routed by the pick-handle method. Again an editorial in the Record of March 5, 1937, recited the dangers of a resurgence of the International and stated:

We know the spirit of May 27, 1935, is still alive—that there are many more now than there were then willing to shoulder pickhandles if necessary to protect their jobs.⁶¹

The evidence establishes that these threats were realized. The activities of the squad cars, which cruised about the area, beating International pickets and members, have been described above. These activities did not cease after the respondents' plants had been reopened and the back-to-work movement completed. Serving as bodyguards for Evans throughout 1935 were Sylvester Walters and Roy Jamison. Both these men were on the pay roll of the Tri-State Union; Walters was paid \$738 on September 30, 1935, by that Union. Dee T. Watters, a witness called by the Board, an officer attached to the Oklahoma State Bureau of Criminal Identification, identified Walters as "Missouri Criminal Number 1." Watters also testified to Jamison's criminal reputation. Similarly W. W. Waters, labor relations representative of the Governor of Oklahoma, identified these two Tri-State Union employees, whom the evidence shows to have been active in violence against International members, as "rather top notch and notorious" criminals. Incidents of Tri-State violence committed against International members are numerous.⁶² Thus on September 14, 1935, John O'Dell, who was 66 years old and an International member, was beaten, while picketing, by five squad-car men. While sitting on a boulder, O'Dell was attacked with black-

⁶¹ As stated above, applicants for membership in the Tri-State Union were asked if they were willing to shoulder pick-handles.

⁶² Violent brutality was also committed by the local law-enforcement officers. In June or July 1935, one Loper, an elderly gentleman who was formerly a justice of the peace, was addressing a group of men, women, and children in a vacant lot in Hockerville, Oklahoma. He was sitting down talking on constitutional rights. Ely Dry, the Picher Sheriff, and Puss Blanton, a deputy who had been a member of the squad-car group, and was at one time the recipient of money paid by the Tri-State Union, drove up. Dry ordered the people to "scram." Loper asked them to "sit still." Blanton then hurled tear gas into the group, injuring a number of the women and children present.

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jacks by these men. They "tore the side of [his] face loose," kicked him, and broke his arm. Among these five men were Jamison and Peck, both of whom were on the Tri-State pay roll. Similarly on October 9, 1937, Neal Nowlin, an International member, was black-jacked while distributing a paper containing articles by International officers. Nowlin's assailant was Burt Craig, a Blue Card member and at one time on the Tri-State pay roll. The climax of the Tri-State Union's violence was, however, reached on April 11, 1937, when in opposition to a scheduled International meeting another pick-handle parade was staged at Picher, Galena, and Treece. In the course of this demonstration, directed from a sound car by Joe Nolan, the International hall at Treece was wrecked, shots were fired into the hall and its records were removed. International members were beaten with the pick-handles and their union buttons forcibly removed.⁶³ So successful was this Tri-State demonstration in creating disorder and forestalling the International meeting that when the International scheduled a meeting at Baxter Springs on July 25, 1937, the officials of that city were forced to recall permission to the International to hold the meeting because of Evans' threat to hold a counter meeting.

The respondents contend that the Tri-State Union's actions were in self-defense, required by the violence of the International members. As described above, the chief violence attributed to the International occurred at Galena, responsibility for which we cannot apportion.⁶⁴ The only other lawless acts possibly attributable to the International involved the shooting of Lavoie Miller, a Tri-State member, on April 11, 1937. This incident cannot properly be assigned as the reason for the Tri-State's parade and violence on April 11, 1937, since the evidence abundantly shows that elaborate preparations, including instructions, and the distribution of free food and liquor, had been made at the Tri-State hall on April 10, before Miller was injured.

The respondents further contend that they are not responsible for the Tri-State's hostility to and violence against the International. Several considerations lead us to reject this contention and to place at least partial responsibility at the door of the respondents. First, as described in Section III B above, the Tri-State Union's violence and lawlessness was marked and severe in June and early July of 1935, when the Tri-State Union's squad cars patrolled the area with armed occupants. At that time, the Tri-State Union's sole source of

⁶³ "Bots" Irwin, a leader of the Tri-State Union, announced during the demonstration that 1 dollar would be paid for each C. I. O. button brought in.

⁶⁴ The question of the International members' responsibility for this is discussed above. The assault on Ely Dry on May 27, 1935, has been described above.

funds was the contribution made by the respondents. The Tri-State's records show that over \$5,000 was spent in this period for "guards" and squad-car activities. Further, as described above, the pick-handle technique with which the Tri-State Union soon became so closely identified, made its first appearance on May 27, 1935. Just before that demonstration, Joe Nolan, Tri-State Union officer, had directed those present to the Picher schoolhouse where the pick-handles could be obtained. These pick-handles did not belong to the individual miners, although they were thereafter kept by the Tri-State Union members and used by them. Since the evidence shows that approximately 4,000 individuals participated in the pick-handle parade of May 27, 1935, and that the Tri-State Union had no funds other than those supplied by the respondents, the inference is inescapable either that the pick-handles were bought by the Tri-State Union with the respondents' funds or that the operators in the district, including the respondents, directly furnished the pick-handles. Thus we find that the respondents in effect did, directly or indirectly, furnish the weapons for the pick-handle parades.

Further, there was direct participation in much of the Tri-State violence by ground bosses, foremen, and other supervisory officials of the respondents.

Martin C. Forrest, a witness for the Board, testified that Oscar Bailey and Newt Keithley were present in the mob demonstration of April 11, 1937. Other Board witnesses identified William DeWitt⁶³ as having been present on April 11, armed with a pick-handle and participating in the beatings which occurred. Joe Newby and James Shaw were also present. The respondents are even more directly related to the April 11 demonstration through the undenied activities of Ray O'Dell, ground boss of the respondent Mining Company's Mary N. Beck mine. On April 10, 1937, the day preceding the Tri-State Union's demonstration, O'Dell directed the employees working under him to quit 15 minutes before the usual closing time and go to the Beck office to collect their checks. At the office, about 100 employees of the respondent Mining Company had gathered. O'Dell called these men together on company property, mounted a truck, and addressed the crowd, stating, "There is, I suppose you fellows all know, there is to be a meeting in Picher tomorrow. It is that damn thing, we thought we had it whipped, coming back at us. How many of you fellows here have bought something that you want to pay for? There is going to be a meeting at the Blue Card hall tonight, and I

⁶³ The respondents contend that DeWitt was not a supervisory employee. The evidence shows, however, that on May 8, 1935, he was ground boss at the respondent Mining Company's Tulsa Quapaw mine and a "cokey herder" or shoveler foreman thereafter.

want all of you men that live around here close to be there." At the same time O'Dell announced that there would be a Tri-State Union meeting that night, and a second one the following day. He assured the employees that "There will probably be plenty of tooth picks⁶⁶ there, if anybody wants one." This meeting occurred on company time and property. We find that through O'Dell, for whose actions they are responsible, the respondents authorized and urged their employees to participate in the anti-International demonstrations of April 11, 1937.

Finally, we hold that the respondents are, by the very nature of the Tri-State Union and its relations to the respondents, responsible for the activities of that Union. These are not spontaneous and isolated instances of individual violence. The Tri-State Union, as described above, was created not for constructive purposes of collective bargaining but in order to break the strike and thereafter to disrupt and defeat the International; it was the creature of the respondents and other operators, used to realize their anti-International purposes. Through the respondents' financial and other support the Tri-State Union gained its initial impetus, and the means for its continuance. The Tri-State Union's consultation and cooperation with the local operators on matters of policy have been described. Further, the very administration of the Tri-State Union, and the conduct of its official spokesman, the Blue Card Record, rested in the hands of the executive committee, composed of Mike Evans, who was closely allied with the respondents, and of two or three of the respondents' supervisory officials. Under these circumstances, we find that the Tri-State Union, in its anti-International activities was acting on behalf of the respondents and as their agent. Therefore, independently of the reasons discussed in the prior paragraphs, we hold that the respondents were and are responsible for the conduct of the Tri-State Union, and for the violence committed by it.

We find that the respondents dominated and interfered with the formation and administration of, and contributed financial and other support to, the Tri-State Union, and thereby interfered with, restrained, and coerced their employees in their exercise of the rights guaranteed in Section 7 of the Act. We further find that the respondents, through their agents, authorized, encouraged and participated in violence and other lawless acts in order to prevent the International from retaining members, holding meetings and functioning on behalf of its members, and that thereby the respondents have interfered with, restrained, and coerced their employees in their exercise of the rights guaranteed by Section 7.

⁶⁶ The record shows that "tooth picks" were pick-handles.

(4) The respondents and the Blue Card Union ⁶⁷

Immediately following the decisions of the Supreme Court of the United States on April 12, 1937, sustaining the constitutionality of the Act, the Tri-State Union took steps to affiliate itself with the American Federation of Labor. The precise details of the origination of the plan to affiliate with the A. F. of L. do not appear from the testimony of Evans and Hickman. Whence came the original suggestion is not apparent. Hickman testified that at a regular Tuesday meeting of the executive committee, "the executive committee authorized Mr. Evans and Mr. Norman to make overtures to the American Federation of Labor for affiliation."⁶⁸ The authorization was acted upon with dispatch. On April 14, 1937, Evans and Norman met with G. Ed Warren, A. F. of L. representative of Tulsa, Oklahoma, and a written agreement was entered into between the Tri-State Union and the American Federation of Labor, as follows:

WHEREAS, The Tri-State Metal Mine & Smelter Workers Union, an independent labor union, desires to become affiliated with the American Federation of Labor, and the American Federation of Labor has agreed to accept the members of said organization upon the following terms and conditions:

One. That upon affiliation the jurisdiction of the transferred members from the Tri-State Metal Mine and Smelter Workers Union shall be vested in the American Federation of Labor.

Two. The Tri-State Metal Mine and Smelter Workers Union agrees to accept affiliation with the A. F. of L. through a Federal Charter to be issued by the American Federation of Labor.

Three. All Working contracts now in force between the Tri-State Metal Mine & Smelter Workers Union and the owners and operators of the mines and smelters in the Tri-State district, to remain in full force and effect until such time as new agreements can be negotiated and no strikes will be called or cessation

⁶⁷ As previously described, the Tri-State Union was generally known and referred to as the Blue Card Union. We have used the term Tri-State Union only for purposes of convenient designation and terminological distinction.

⁶⁸ Although the minutes of the executive committee are otherwise complete and in evidence, the minutes during the period in question are missing, this apparently due to the destruction of Tri-State records during the hearing. Glenn Hickman had been directed by the Trial Examiner to bring the records to the hearing. Hickman was reluctant but finally brought the records to the building where the hearing was being held, keeping them in his car, which he had locked, and offering to produce each specific item as called for. He was then directed to bring in the entire mass. Hickman returned to the hearing with the announcement that the car had been stolen. Testimony of a detective who investigated this incident disclosed that Hickman's car had been found the following day but that it had been burned, destroying all the records. The detective's testimony established that the car had been fired from inside, and that the outside had been damaged only by the heat. Hickman was able, nevertheless, to procure copies of some of the records.

of work be allowed for violation of existing contracts without the consent of the American Federation of Labor.

Four. It is further agreed and mutually understood by and between the parties hereto that the preliminary organization expense of affiliation with the American Federation of Labor shall be borne by the Tri-State Metal Mine & Smelter Workers Union.

This agreement was signed by Evans and Warren.

Evans was vague in his testimony concerning this agreement and the subsequent steps taken. He simply testified that "sometime in April or May" 1937, the Tri-State Union "dissolved." In any event, the Blue Card Record of April 16, 1937, announced:

Blue Card Mass Meeting Called Important Session to be held Sunday at Fair Grounds, Miami. The greatest protest demonstration against the C. I. O. ever to be stated in the United States will take place at 2 o'clock . . . Climaxing a week of labor disturbances of electric tension, the executive committee announce the mass meeting of blue card members for the purpose of ratifying the action of the committee.⁶⁹ "In my opinion," spoke Mr. Norman, "it will be necessary to affiliate with some strong national organization in order that we might protect ourselves against the ravishes of John L. Lewis and his Committee for Industrial Organization."

On April 18, 1937, the scheduled mass meeting of the Tri-State Union was held at Miami, with approximately 6,000 persons present. A copy of the minutes of this meeting, introduced into evidence by the respondents, describes the proceedings as follows:

Meeting called to order . . . by Joe Nolan, president of the Picher, Oklahoma local, who gave the purpose of the meeting as a gathering of more than the necessary two-thirds of the total membership for the purpose of ratifying or rejecting the entrance into the American Federation of Labor by the Executive Committee at a conference held in Tulsa . . .

Mr. Nolan⁷⁰ introduced Attorney Norman, who delivered an address, explaining the actions of the Committee, setting out the facts which, in the opinion of the leaders, made affiliation with some national labor organization imperative, and asking for complete dissolution of the Tri-State Metal Mine and Smelter Workers Union and immediate preparatory steps for organization of a Union affiliated with the American Federation of Labor.

⁶⁹ The announcement did not mention what the "action" was, and all mention of the A. F. of L. is omitted.

⁷⁰ Evans testified that he introduced Norman "to discuss the details" of the action being taken.

Secretary Treasurer Hickman, in this connection, introduced the following resolution:

WHEREAS the facts set out in Mr. Norman's address prove conclusively that it is no longer advisable for the Tri-State Metal Mine and Smelter Workers' Union to attempt to function as an independent Union, and

WHEREAS the American Federation of Labor, being more nearly in accord with the purposes and policies of the Tri-State Metal Mine and Smelter Workers' Union, than any other national labor organization, and

WHEREAS ground work for affiliation of the Tri-State lead and zinc workers with the American Federation of Labor has already been laid by officials of the Tri-State Mine and Smelter Workers' Union, be it therefore

RESOLVED That the Tri-State Metal Mine and Smelter Workers' Union take this opportunity and means of completely dissolving itself as provided in Section 2 of the Constitution, and that full authority be vested in the Executive Committee for organizing a new Union in conformity and affiliation with the American Federation of Labor, and be it further

RESOLVED that all funds and property of the Tri-State Metal Mine and Smelter Workers' Union be held in trust by the Executive Committee until such time as a new Union affiliated with the American Federation of Labor has been organized, at which time said Executive Committee shall turn said funds and property fully intact over to officers of the newly organized Union.

Following a lengthy discussion of the matter before the house, Mr. Nolan called the question. Resolution adopted by unanimous vote of the approximate 6,000 members present.

Testimony of witnesses who attended this meeting emphasizes certain features of the proceedings not mentioned in the minutes. Charlie Edward King, a witness for the Board, testified that he attended the meeting and that "Norman said the Wagner Bill wasn't constitutional and 'we didn't expect that it would be passed but as they did pass it we had to do something' and that, 'As the Wagner Bill was upheld we have to do something, but we will yet be Blue Carders. We will print a sign A. F. of L. and Blue Carders across that sign and hang it in front of our hall so that people will know that we are yet Blue Carders and these other men had just as well leave town.'" After Norman read the A. F. of L.-Tri-State Union agreement, Nolan said, "Every man and woman that agrees to this agreement, arise to your feet." King testified that "they stood up by the thousands." Then after a whispered conference with Norman, Nolan announced, "Anybody that is contrary to this agreement

stand up and get knocked down, please." No one stood up.¹¹ King testified that although the meeting lasted for 4 hours, only 45 minutes or an hour were devoted to union affairs since the speeches were "very short." The remainder of the meeting was devoted to orchestra music. John McAlister, who was a Tri-State member during this period and who attended this meeting, corroborated King's testimony. McAlister testified that Norman spoke and said that "the blue card union can't stand the Wagner Act and it had to be changed and affiliate with someone else," but that "it wouldn't change the rulings nor the officers nor nothing of the company, that they would go on just the same as it had." Nolan then arose and called for all in favor of affiliation to stand. After this, Nolan announced, "All you Goddam — — that isn't in favor stand up and get knocked down." Jess Thompson who also attended the April 18 meeting testified that Norman said that "it would still be the Blue Card Union" and that "they wouldn't change their way of doing things." Norman, according to Thompson, assured the meeting that Evans and Nolan would continue to act as president and vice president, respectively, and that the Union "would still fight the International." Thompson also testified that Nolan stated, "All those that don't want to join it stand up and get knocked down." Finally, H. D. Kelley, who was present at the meeting, testified that it was announced¹² that the men had come to ratify "going into the A. F. of L." that "they would keep the same officers and same set-up under the A. F. of L." and that it was then stated that "All of them that is not in favor of it stand up and see how quick you are knocked down." All these witnesses testified they heard nothing about dissolution.

The respondents called no witnesses to testify concerning this meeting and we find that it occurred as testified to by King, McAlister, Thompson and Kelley.

On April 24, 1937, the A. F. of L. granted separate charters to Federal Labor Union No. 20576, Picher, Oklahoma, Federal Union No. 20577, Joplin, Missouri, and Federal Labor Union No. 20578, Galena, Kansas. No further steps were taken until May 16, 1937, when representatives of the A. F. of L. and Evans and Hickman, as "trustees of the assets of the former Tri-State Union" held a conference at Kansas City, Missouri, and entered into an agreement providing that a convention of delegates from the Federal Labor Unions would be held immediately in Picher for the purposes of electing an executive committee and officers; that a constitution and bylaws be

¹¹ As described above, Nolan was popularly known and referred to in the Blue Card Record as "The Pick-Handle King" by virtue of his leadership in the "pick-handle" parades.

¹² Kelley could not get into the grounds and listened to the proceedings through a loud-speaker.

drawn up; that thereafter a temporary certificate of affiliation with the A. F. of L. be issued; that such certificate should not be withheld because of any decision of the new union to be formed by the delegates to take over "the officers, property and assets of the Tri-State Union"; and that any additional locals thereafter organized should be governed by the new union in the same manner as the locals at Picher, Joplin and Galena "are now governed and controlled by the said Tri-State Union."

Pursuant to this agreement, five delegates were elected from each of the three Federal Labor Unions. These delegates were elected by the members of each local. Hickman testified that none of the members of the executive committee were elected. Hickman admitted, however, that some of the executive committee "may have been" at the convention "unofficially." The convention, held on May 20, 1937, at Picher, was presided over by Roy Wood, a delegate, who was a foreman of the respondent Lead Company's Joplin plant. Wood opened the convention by "explaining that [its] purpose . . . was to formally organize a new union in conformity with the A. F. of L., and gave a brief history of the facts leading up to the meeting." The delegates decided to call the new union the "Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers." The delegates next selected as the new executive committee the same 12 men who constituted the executive committee of the Tri-State Union. The committee of the new union included, therefore, Oscar Bailey, Newt Keithley and Roy Wood, who succeeded William DeWitt. These three held supervisory positions with the respondents. Finally it was moved that "all funds and property formerly belonging to the Tri-State Metal Mine and Smelter Workers Union, now held in trust, be deposited and assigned over to the duly elected officers of the new union or the Board of Trustees thereof."

Shortly after May 20, 1937, the A. F. of L. issued a temporary certificate of affiliation to the Blue Card Union. On June 16, 1937, the A. F. of L. issued a formal charter. Meanwhile, on May 20, immediately following the delegates' convention, the executive committee elected new officers. Evans was continued as president; Ray Morris, a leader since the back-to-work movement and a member of the executive committee throughout, was chosen as vice president; and Hickman was reelected as secretary-treasurer. Shortly after the convention, Ray Morris dropped out and Joe Nolan was elected by the executive committee to succeed to the vice presidency.

The respondents urge that by the steps leading to affiliation described above, the Tri-State Union ceased its existence, replaced by a wholly new organization. This contention is wholly unimpressive. To accept it would be to blind ourselves to the realities of the situa-

tion. The evidence fails to establish that any substantial change in the Tri-State Union was accomplished by these formalities. Indeed, as described above, the sole argument made by the Tri-State leaders who engineered the process of "reorganization" was that the step was necessary to the continued existence of the Tri-State and that by affiliation, the Tri-State would in no way change. As stated in the editorial columns of the Blue Card Record of May 7, 1937:

Technically we are now operating under the general policy laid down by the American Federation of Labor; really we are still the Blue Card Union⁷³ in every respect and as such we intend to remain. If the recently negotiated affiliation means the sacrifice of a single iota of confidence we have established with the employers of this district, it is better that we repent of our action and fight to the end as an independent union.

The history of the Blue Card Union subsequent to April 18, 1937, gives conclusive indication of the fact that the old Union continued with little change. No real attempt was made to change the identity of the Tri-State Union and the indicia of such continuance are many. At all times, before and after April 1937, it was known as the Blue Card Union. Before April 1937, the Blue Card Record contained on its first page a seal which bore the date "A. D. 1935,"⁷⁴ and the legend, "Official Publication of the Tri-State Metal Mine & Smelter Workers Union." It was not until November 19, 1937, the week after the Board had issued its complaint, that the Record's seal finally omitted the date 1935, while the name of the Tri-State Union remained at least until October 15. Only the words "affiliated with the A. F. of L." had been added on May 6, 1937. Similarly, the ledger used by the Tri-State Union continued in consecutive pagination without any break to indicate a change of unions. One hundred and nine deposit slips, representing deposits from April 17 to September 9, 1937, of union monies in the First State Bank of Picher are in the name of the Tri-State Union.⁷⁵ Checks dated as late as June 28, 1937, were signed by Hickman over the designation, "Tri-State Metal, Mine and Smelter Workers Union." Dues books, applications and other organization papers continued throughout this period to be distributed under the name of the Tri-State Union.

The respondents, however, sought to minimize the significance of these physical indicia of continuity by adverting through cross-ex-

⁷³ See footnote 67 above.

⁷⁴ This date on the seal, as Evans testified, represented the date when the organization was established.

⁷⁵ The assets of the Tri-State Union, amounting to several thousand dollars, were at first, according to Hickman, turned over to Evans, Hickman, and the executive committee as "trustees." Thereafter, on organization of the Blue Card Union, the "trustees" passed the assets to the latter Union.

amination of Hickman's testimony that at the time the Tri-State Union affiliated with the A. F. of L., the Tri-State Union had on hand approximately \$4,000 worth of stamp books, ledger sheets and other supplies, and that as a matter of economy the Blue Card Union continued to use such supplies. Economy would, however, scarcely account for the failure to omit the date on the Blue Card Record's seal, nor the continuance of the name of the Tri-State Union thereon, particularly in view of the fact that the words of affiliation were added. Hickman's testimony, moreover, is further robbed of its force by the testimony of Gerry A. Manning, vice president of the Joplin Printing Company, the company which did the printing for the Tri-State Union. Manning testified, and we find, that on May 5, 1937, 3 weeks after the "dissolution and affiliation" meeting, the printing company received an order for 50 books or 10,000 duplicate sets of dues receipts bearing the inscription "Tri-State Metal, Mine & Smelter Workers' Union." This item was accepted and paid for without complaint. Manning further testified that on September 2, 1937, the printing company received an order to reword the heading of the Blue Card Record to "The Official Publication of the Blue Card Union of Zinc and Lead, Mine, Mill & Smelter Workers," and that the price of this job amounted to \$1.23. The failure to make this change before can scarcely be attributed to reasons of "economy." Finally Manning testified, and we find, that it was not until November 15, 1937, after the Board's complaint was issued, that the Blue Card Union, through Kelsey Norman, ordered the printing of a new constitution and bylaws.⁷⁶ In light of this testimony, we cannot accept the reasons assigned by Hickman for the identity of the physical indicia used by the Tri-State and Blue Card Unions.

Evidence other than these physical indicia shows that the Blue Card Union was but the continuation of the Tri-State Union and that it was so regarded by its officers and members. Thus on June 4, 1937, after the purported dissolution, the Blue Card Union held a "second anniversary" picnic at which Evans spoke in regard to the Union's 2 years of existence. Minutes of the meetings of the Blue Card locals, dated through September 1, 1937, handwritten by the local recorders, bore the written name of the Tri-State Union.⁷⁷ Service of the Board's complaint on the Tri-State Union on November 8, 1937, was accepted and acknowledged in the offices of the Blue Card Union by Roxie Bradley, Blue Card Union stenographer.

It is also clear that the purported dissolution did not actually change the policy, attitude or methods of the Tri-State Union. For example, the minutes of a local Blue Card Union meeting on April

⁷⁶ Only 250 copies of the constitution were ordered.

⁷⁷ Copies of the minutes, typewritten in Hickman's office, were changed to substitute the name of the Blue Card Union.

21, 1937, disclose that the application for membership of Luther Goff was rejected because of the fact that he had been absent at the meetings held during the 2 preceding weeks. Thus it appears that membership in what purported to be a new organization was refused because of failure to attend meetings of a prior union allegedly dissolved.⁷⁹ Further evidence of the continuity of attitude is contained in the Blue Card Record's editorial of June 25, 1937, an editorial referring to "we . . . operators" as described above. Nor did the Blue Card Record diminish its bitter attacks on the C. I. O., the International or even, on occasion, organized labor in general. Evans' prevention of the scheduled International meeting in Baxter Springs on July 25, 1937, has also been described above. Finally, the evidence shows that foremen and other supervisory employees were, at least for a time, permitted to remain members of, and active in, the Blue Card Union. Thus, for example, the minutes of the executive committee meeting of September 14, 1937, report:

Roy Wood⁷⁹ was instructed by the Committee to notify all foremen at the Eagle-Pickher Smelter at Joplin was to keep on paying their dues until such time as given exemption by the Committee.

As stated above, the executive committee elected by the delegates on May 20, 1937, was identical with the Tri-State Union's executive committee, with the exception of Wood's substitution for DeWitt. Keithley and Bailey, the respondent Mining Company's ground bosses, continued to serve on the committee. Sometime during the summer of 1937, and after the affiliation,⁸⁰ the ground bosses dropped out of the executive committee and were replaced by ordinary employees.⁸¹ However Hickman testified, and we find, that the executive committee itself chose the successors of those who resigned.⁸² The management of the Tri-State Union thus virtually perpetuated itself, and the respondents through their supervisory employees on the committee participated in such choice. Finally Mike Evans, whom we have found to be an operator closely connected with the

⁷⁹ The minutes of the executive committee meeting of September 7, 1937, state: "William Henry Slater, whose application for membership had been held up because he had worked in the mines for the past two years without joining the union, came before the committee to explain this circumstance and attempted thereby to get a Blue Card." [Italics supplied.]

⁸⁰ As we have found above, Wood himself was one of the respondents' supervisory employees.

⁸¹ Hickman placed the dates at "a few months" before the hearing and shortly after the May 20 convention.

⁸² This was the same period at which the various supervisory employees of the respondents who testified set the date of their "voluntary" resignations from the Blue Card Union as described above.

⁸³ The minutes of the executive committee meeting of June 15, 1937, report that Bailey and Detchemendy resigned from the committee. "Both resigning members were prevailed on to attend next week's regular meeting to vote on the incoming members . . ." This referred to the new committee members.

respondents, and representing their interests throughout, remained as president of the Blue Card Union, chosen, as described, by the executive committee, until November 11, 1937. On November 11, 1937, immediately after the Board issued its complaint in the case, Evans telegraphed William Green, president of the A. F. of L., and requested that immediate action be taken on Evans' resignation. On April 24, 1937, Evans had offered his resignation to Green, but no action was taken thereon until the subsequent wire on November 11, 1937. The executive committee chose Joe Nolan²² as Evans' successor.

Conclusions with respect to the relationship between the Tri-State Union and the Blue Card Union

From the events described above, and from the preceding findings, we think it is clear that for all practical purposes, the Blue Card Union was identical with and a continuance of the Tri-State Union. Other than in the resolution read by Hickman at the meeting on April 18, 1937, there is no evidence that it was ever called to the attention of the members of the Tri-State Union that there was supposed to be an actual dissolution. The Blue Card Record during this period mentioned only the question of affiliation, not dissolution. Indeed, the only witnesses who testified concerning the meeting on April 18 testified that they recalled nothing about dissolution. From analysis of the evidence concerning the steps taken to replace the Tri-State Union by the Blue Card Union, we cannot escape the conclusion that the process was engineered and completed not by the members themselves but by Evans, Norman, Hickman and the executive committee, representing the respondents and other operators, as a desperate effort to preserve the Tri-State Union. The rank and file employees took no part in the "reorganization" until it had become a *fait accompli* through the agreement of April 18, 1937. Even then, their participation was formal at best. At a public meeting, open to members and non-members alike, they were presented with the "choice" of approving by rising vote what had already been achieved. Only by way of afterthought were the members presented with an opportunity to reject the agreement, and this alternative was one which, under the circumstances, they could scarcely choose. There is nothing in the evidence to show that members individually had an opportunity to join or refuse to join the "new" Union, or that new applications or membership cards were presented to them. Membership in the Tri-State Union, willy-nilly, brought membership in the

²² As described above, Joe Nolan also operated a mine at the time of the strike in May, 1935. Hickman testified at the hearing that he did not know what arrangement Nolan had made with respect to his mine but that Nolan devoted no time to it.

Blue Card Union. As repeatedly stated by the Blue Card Record and by Norman, the process was one to perpetuate unchanged the Tri-State Union.

Under such circumstances, we are compelled to conclude that mere observance of certain formalities, and affiliation with a national labor organization, without more, are insufficient to change the character of a company-dominated union or to invest such a union or the respondents with immunity. At no time did the respondents withdraw from its relations with its creature; at no time was it announced that the Tri-State Union was ended. Had the Tri-State Union "re-organized" as described above, omitting only the process of affiliation, it would be clear that it had not purged itself of its company-dominated characteristics. We cannot adopt a different rule because of the mere fact of affiliation. We conclude, therefore, that the Tri-State Union, its policies, its members, and its assets were transferred bodily into the Blue Card Union, and that the Tri-State Union, therefore, has persisted to the present as alleged in the complaint. We conclude further that the affiliation was itself a part of the plan to perpetuate the effect of the respondents' illegal campaign. We have already found that the Tri-State Union was created and supported by the respondents, that the respondents, through their representatives in the Tri-State Union's offices and committees, participated in and dominated the administration of the Tri-State Union, and that the Tri-State Union was itself an agency of the respondents and other operators. To the extent that we have found that the respondents controlled the Tri-State Union, they also managed and controlled the "transformation" into the Blue Card Union; to the extent that we have found that the respondents were represented by Evans and by the Blue Card Union's executive committee after April 18, 1937, the respondents dominated the Blue Card Union; and to the extent that we have found that the Blue Card Union perpetuated the respondents' policies previously pursued through the Tri-State Union, the Blue Card Union represented the respondents.

We find, therefore, that by their participation in the formation and administration of the Blue Card Union through membership of its supervisory officers and employees, and through other representatives, in the Blue Card Union, and the executive committee thereof, the respondents have dominated and interfered with the formation of, and contributed support to, the Blue Card Union and have thereby interfered with, restrained, and coerced their employees in their exercise of the rights guaranteed in Section 7 of the Act.

"Since we have found the Blue Card Union to be a continuance of, and identical with, the Tri-State Union, the financial and other contributions made by the respondents to the latter union accrued to the credit of the Blue Card Union also.

E. Discriminatory refusals to reinstate

The complaint alleges that at all times since June 5, 1935, the respondents have refused employment to those persons employed on May 8 who went out on strike and were International members, and that since June 5, 1935, the respondents have "required membership in the Blue Card Union as a condition for the tenure of employment and . . . have refused to reinstate employees . . . for the reason that said employees are not members of the Blue Card Union."⁸⁵ The respondents, in their answers, deny that they have so discriminated, or that they have refused employment to any employees after the strike because of their membership in or activities in behalf of the International, or that they have required as a condition precedent to obtaining or retaining employment membership in the Tri-State or Blue Card Union. The relevant evidence on the issue can most conveniently be discussed with reference to three chief questions: (1) the execution and existence of a contract between the respondents and the Tri-State Union; (2) the direct pressure, coercion, and intimidation exercised by the respondents upon their employees to force them to abandon the International and join the Tri-State or Blue Card Union; and (3) the statements of the respondents' supervisors concerning the conditions of employment imposed.

(1) The agreement between the Tri-State Union and the respondents

Paragraph 35 of the complaint alleges that "On or about June 5, 1935, the respondents entered into an agreement with the Blue Card Union whereunder they agreed to prefer in hiring in the Tri-State area such persons as should be members of said organization." In their answer docketed on November 17, 1937, the respondents, while denying many of the allegations of the complaint, admitted that they agreed to employ such members of the Blue Card Union as might be necessary to operate said properties, all of which, however, was prior to the effective date of the Wagner Act . . .

In their amended and substituted answer, docketed on November 22, 1937, the respondents:

admit that on the 8th day of June, 1935, they entered into an agreement with the Tri-State Metal Mine and Smelter Workers Union, which agreement was in all respects lawful:

⁸⁵ These allegations constitute the "Second Cause of Complaint." Coupled with these allegations in this cause and as a part thereof, the complaint also alleges the facts concerning the strike, the back-to-work movement, and the respondents' relations to the Tri-State Union. We consider that such events are an integral part of the issue concerning discrimination, and we have separated them here solely for the purposes of convenience.

This answer was sworn to by George Potter, vice president of the respondent Mining Company, and A. C. Wallace, attorney for the respondents.⁸⁶ In their second amended and substituted answer, dated December 4, 1937, the respondents repeated the admission of the execution of the agreement. This answer was also sworn to and verified by Potter and Wallace. Finally on April 7, 1938, shortly before the close of the hearing,⁸⁷ the respondents amended their answer so as to state that the respondent Mining Company had entered into such an agreement but that the respondent Lead Company "at no time entered into any agreement of any kind or character with said union." This amendment was also sworn to and verified by Potter and Wallace.

The agreement in question, dated June 8, 1935, is as follows:

To the Officers and Executive Committee of the Tri-State Metal Mine and Smelter Workers Union:

The undersigned Employer is familiar with your efforts in organizing the actual workers in the Tri-State field for the purpose of dealing with the employers, and in appreciation of your doing so, hereby agrees:

That in its operations in this district, it will hereafter, so far as practicable and to the greatest extent possible, employ ONLY members of your organization in the following manner:

1. Ability and other personal qualifications being equal, we will in good faith give preference in employment in all cases to members of your union, deviating from this only in case of obligation to a prior employee, or substantial decrease in efficiency in our operations. In as much as [it is] possible, some of our old and trusted employees may in good faith not wish to be a member of ANY labor organization, we do not feel we should be obligated to employ members of your organization exclusively;

2. While of course we must retain the right in every instance to meet with any one or more of our actual employees to discuss conditions or matters relating to employment or working conditions, we hereby agree to meet with any representative or committee from your union, bearing proper credentials, to discuss any matters whatsoever pertaining to employment or working conditions, and to recognize and meet with your representative to the exclusion of all other organizations; and will endeavor to adjust matters which they may bring before us.

⁸⁶ As described below, Potter was directly related to the negotiations and events during the period in question.

⁸⁷ At some time previous, the respondents had moved orally to amend in this respect.

In other words, subject to the above, we hereby recognize your union as the bona fide organization of employees in the Tri-State district, for the purpose of collectively bargaining with us as employer.

EAGLE-PICHER MINING & SMELTING COMPANY,

(Signed) GEO. W. POTTER, *Vice President*.

Potter, who was in charge of labor relations of both the respondents during this period, and who was representative of the respondents in the early conferences with Evans, in the financial dealings with the Tri-State Union, and in the negotiation of this agreement, was not called upon by the respondents to testify, and no explanation for his absence was offered.

Several considerations impel us to the conclusion that this agreement was a device intended by the respondents to exclude International members from employment and to avoid any obligation to deal with the International. Under all the circumstances, the agreement was plainly not a bona fide collective bargaining contract. Campbell admitted that at no time was any inquiry made concerning the number of employees represented by the Tri-State Union. In contrast, as described in Section III A above, when the representatives of the International had, shortly before, attempted to bargain with the respondents, the latter had placed every obstacle in the path of the International, raising both technical and non-technical objections to the International's right to represent the employees. The evidence shows that up to the time of the strike, the respondents had proclaimed their insistence upon maintaining an "open shop." Yet on the same day that Evans and Norman presented an agreement which violated the very principles to which the respondents had only a short time before protested adherence, Potter signed such an agreement and agreed to deal with the Tri-State Union "to the exclusion" of all other labor organizations:

Campbell, the only witness called upon by the respondents to testify concerning the execution of this agreement, and himself a member of the Tri-State Union, sought to minimize its significance through testimony that it in no way applied to those workers employed by the respondents on May 8, 1935. He testified that the contract as presented by Evans and Norman restricted the respondents in their right to employ all former employees regardless of union affiliation, that the respondents protested vigorously at any attempt thus to restrict such right, and that accordingly the respondents altered the contract so as to exclude from its operation all former employees.

Campbell's testimony concerning the respondents' earnest negotiations and anxiety on behalf of all former employees is refuted by

comparison of the agreement in question with the agreement between Mike Evans as representative of the Tri-State Union and himself as operator of a mine known as the Craig lease, where he employed some 35 workers. This agreement, dated June 4, 1935, 4 days before the respondents' agreement, is precisely identical with the respondents' agreement. Only the name of the employer and the emphasis on the words "only" and "any"—which in the Evans agreement appear in small letters—vary from the respondents' agreement. We cannot presume that Evans, in dealing with himself, indulged in extensive collective bargaining or raised vigorous objections to the proposals he was submitting to himself. In the light of the identity between the respondents' agreement and Evans' agreement, we must reject Campbell's claim that he or Potter negotiated at all concerning, or made alterations in, the proposed contract. Further, we cannot accept Campbell's claim that the contract either was intended to or actually did exclude all former employees from the requirement of membership in the Tri-State Union. The agreement exempts only "some of our old and trusted employes who may not wish to be a member of ANY labor organization." It is abundantly clear that the respondents did not consider International members as falling within either the category of old and trusted employees or within the category of those who were not desirous of joining any labor organization. Campbell, in subsequent testimony, admitted that he considered the contract to be "a closed shop or preferential contract."

Thus at the outset serious doubt is cast not only upon the bona fides of the contract but, more particularly, upon Campbell's testimony concerning it. Mindful of these circumstances, we turn to the respondents' contention that the contract was never invoked and that it was considered inapplicable after July 5, 1935, when the Act became effective.

Again the respondents' chief witness on the issue of the lapse of this agreement was Campbell. Campbell testified that when the mines reopened, "the question of preference never arose" and that as far as he was concerned, no preference was ever extended to members of the Tri-State Union. He further testified that on, or about July 18, 1935, Joe Newby, superintendent and general manager of the Galena Smelter, asked Campbell about the contract, and that Campbell advised Newby "to forget about it and pay no attention to it" because it had been "kicked out by the Wagner Act" and that it "didn't affect former employees." Newby testified that he had heard rumors concerning the existence of the contract, and that he "was kind of up in the air wondering what the devil it was." Newby testified that he accordingly inquired of Campbell, who told him that "at one time there was a contract" but

that "it didn't apply to any former employees, and that the Wagner Act went into effect and kicked it out."⁸⁸

The only other evidence adduced by the respondents to show that the agreement had never been applied was the testimony of the various supervisory employees that they have never heard of the contract. Niday, Ritter, and Frudenberg testified that they had been unaware throughout that any such agreement had been entered into. Campbell testified that he never was aware of the general belief that a contract existed. We are unable to accept the credibility of these disclaimers of knowledge. Frudenberg and Campbell were themselves members of the Tri-State Union. Niday admitted that he had discussed with both Frudenberg and Ritter the question of whether employees were required to join the Tri-State Union. Each admitted that he read the Blue Card Record, although each denied having seen announcements⁸⁹ therein on August 2, 1935, and thereafter, that the Mining Company had signed a closed-shop contract with the Tri-State Union. Finally, other supervisory employees testified to the widespread belief that such a contract did exist. Hallows "heard rumors" and believed that the respondents had signed a contract agreeing to employ only members of the Tri-State Union at the mines. He testified he made no inquiries concerning it. Newby testified that "it was all over town" that there was a contract between the respondents and the Tri-State Union.

We find that the respondent Mining Company entered into a virtual closed-shop contract with the Tri-State Union intended to exclude and actually excluding International members from employment, and that the respondents' supervisory employees were aware of the agreement.

As described above, the respondents contended, through Campbell's testimony, that in any event the contract ceased to exist after July 5, 1935. In view of the widespread belief in the area that there was such a contract, described both above and below, and in view of the severe restrictions the contract placed on employees' free right of self-organization, we hold that the respondents were, on and after July 5, 1935, under an affirmative duty to cancel the agreement and to announce cancellation. In this duty the respondents wholly failed. Campbell admitted that he never notified the Tri-State Union that the contract was no longer operative. Except for the conversation between Newby and Campbell, described above, the record is devoid

⁸⁸ The virtually identical phraseology of these two witnesses' description of a casual conversation occurring about 3 years before is probably explained by the fact that Campbell, who testified after Newby on this point, was present throughout the hearing since, as an officer of the respondents, he was exempted from the general rule excluding all those who knew they were to be witnesses.

⁸⁹ These announcements are discussed below. We do not believe that in reading the Blue Card Record, the respondents' officials and supervisors happened to miss such important material vitally concerning their own employees.

of evidence that any steps were taken to announce the alleged cancellation of the contract. On the contrary, the evidence shows that on and after July 5, 1935, the respondents made certain statements, and authorized other statements, that the agreement was in full force and effect. Thus Ora L. Wilson, vice president of the International, testified that shortly after ^{on} July 5, 1935, he conferred with Potter concerning a settlement of the strike and a return to work, and that Potter refused, stating that it was "too late" since the respondents already had a contract with the Tri-State Union. A few weeks later, Wilson testified he renewed the offer to Potter and was met with the same reply. Campbell, who was present at the conference, testified that he could not recall its details. Potter was not called upon to testify. We find that Potter stated, after July 5, 1935, that the contract was still in existence.

Further, the respondents authorized other statements that the contract was still in existence after July 5, 1935. As described above, the Tri-State Union's official publication announced on August 17, 1935, that 95 per cent of the mine operators in the Tri-State area had signed contracts with the Tri-State Union "agreeing to employ blue card men exclusively—which agreement is binding and obligatory for the life of the Tri-State Union." The paper appended a list of the contracting companies and included the respondent Mining Company. A similar announcement was printed in the August 2, 1935, issue of the paper, stating that "Mining companies representing 95 per cent of the Tri-State Production, composing all of the principal operators in the District . . . have signed contracts with your Executive Committee . . . binding themselves to employ our blue card boys." As stated above, this paper was the official publication of the Tri-State Union. Although it was generally read by their officers and supervisory employees, the respondents took no steps to deny these statements. The respondents, through their supervisory employees serving on the executive committee and through their "advertising" contributions to the paper, participated in its publication. Through permitting its distribution within their properties, the respondents indicated their approbation of the paper. We find that the respondents authorized and ratified the statements described above as they appeared in the Tri-State Union's paper. Moreover, the respondents authorized similar oral statements of the continued existence of the contract. As described more fully in the section

²⁰ The transcript of Wilson's testimony, given at the first day of the hearing, records Wilson's having stated that the conference occurred *before* July 5. The surrounding testimony given by Wilson indicates this is an error, and later in the hearing Wilson returned to the stand to testify that the stenographer had improperly recorded his testimony. At the close of the hearing the stenographer filed an affidavit disclosing that he had erred in transcribing his notes and that the word "after" should be substituted for "before."

immediately following, Kelsey Norman addressed the employees of the research laboratory and the respondent Lead Company's Joplin plant. During this address, an employee questioned Norman concerning the contract. In reply, Norman stated that the "contract gives preference to men belonging to the Union. The contract between the Eagle-Picher Lead Company and the Union is so worded that it includes you." Norman's address was given with the express permission of the respondent Lead Company's vice president. It was given in the plant on company time, without reduction in pay to the workers. We hold that Norman's statements in this respect were approved and authorized by the respondents.

Under all the circumstances, we conclude (1) that the respondent Mining Company executed a virtual closed-shop contract with the Tri-State Union on June 8, 1935; (2) that although the contract was signed only by the Mining Company, in actual application, as described below, no attempt was made to distinguish between the respondent Mining Company and the respondent Lead Company in this respect;²¹ (3) that, therefore, the contract as written was supplemented by an identical understanding between the respondent Lead Company and the Tri-State Union; (4) that such contract was intended to and actually did provide that abandonment of membership in the International and joining the Tri-State Union were conditions precedent to obtaining or retaining employment with the respondents; (5) that such contract was not at any time before or after July 5, 1935, cancelled by the respondents; (6) that such contract was stated by the respondents' officers after July 5 to be in full effect; (7) that the respondents, although aware of statements that the contract was still in effect, never repudiated such statements; and (8) that the respondents authorized, approved, and ratified statements made by Kelsey Norman and the Tri-State Union's official paper that the contract continued in full force and effect after July 5, 1935. We also find that on and after July 5, 1935, the contract was not valid under Section 8 (3) of the Act because made with a labor organization whose formation and administration had been dominated, interfered with, and supported, by the respondents.²²

(2) Direct pressure exerted by the respondents to coerce membership in the Tri-State Union

We have described the respondents' participation in the back-to-work movement and in the creation and administration of the

²¹ As described herein, Potter was at this time in charge of labor relations for both the respondents.

²² Cf. *National Labor Relations Board v. Stackpole Carbon Company*, 105 F. (2d) 167 (C. C. A. 3d, 1939); *Matter of Kansas City Power & Light Company and International Brotherhood of Electrical Workers, Local Union B-412*, 12 N. L. R. B. 1414, and cases cited in footnote 12 therein.

Tri-State Union. From such activities of the respondents, it is reasonable to infer that the respondents were vitally interested in forcing their employees to abandon the International and to join the Tri-State Union. Such an inference is fully supported by the evidence.

Although the respondents vigorously deny that they required membership in the Tri-State Union as a condition of employment, they called no ordinary employees to testify that they had obtained or retained employment without abandoning their membership in the International or without joining the Tri-State Union. There is not in evidence a complete computation of the number of the respondents' employees who were actually members or non-members of the Tri-State Union.⁹³ There is, however, evidence of a remarkably high proportion of Tri-State Union members among the respondents' employees. As described above, with the exception of one or two of their highest officers, all of the respondents' supervisory employees were members of the Tri-State Union, most of them having joined at approximately the same time in the fall of 1935. Further, Board Exhibit Nos. 240, 241, and 242 are summaries, compiled by check of all available records by counsel for both parties and by auditors, of information concerning all persons claimed by the International to have been connected with it in any way. Such information included data as to whether the persons were reinstated by the respondents and whether they joined any other union. These exhibits were supplemented by Respondent Exhibit No. 43, a folder containing affidavits of many persons claimed to have at any time been represented by the International. These affidavits also show subsequent employment and other information concerning these men. Examination and analysis of these four exhibits disclose that of all persons listed in Board Exhibit Nos. 240, 241, and 242, 185 were re-employed by the respondents after the strike. Of these, 174 were disclosed by available Tri-State Union records⁹⁴ to have joined that

⁹³ In the course of his examination of Campbell, the respondent's counsel asked whether Campbell had checked the records of the Tri-State Union with the Joplin smelter's July 5, 1935, pay roll to ascertain how many of such employees were Tri-State Union members. The Board's counsel objected to the question since he had had no opportunity to check on the figures to be presented. He also objected on the ground that prior testimony had shown that immediately on the reopening of the mines and plants, the respondents had employed non-Tri-State members, but had thereafter required such membership as a condition of retaining employment. The Board's counsel therefore requested a later pay roll also, against which the Tri-State membership could be checked. The Board's counsel offered to undertake the check of the membership records against the pay roll, and pending such check, the Trial Examiner sustained the objection "at this time." We hereby affirm this ruling. The pay rolls were not offered in evidence again.

⁹⁴ We do not regard the absence of such notations as conclusive evidence of non-membership, since at best it is only negative. Further, comparison of the affidavits with the memoranda show that in several instances, information contained in the former, which were the individuals' own statements, were absent in the latter, which was a mere compilation by third parties.

union. Where dates are given for joining the Tri-State Union and returning to work, the exhibits disclose that the former almost invariably precede the latter. Six other persons of the 185 who returned to work signed back-to-work petitions⁸⁸ before they were reemployed, although there is no notation that they joined the Tri-State Union. Three other persons who were reinstated did not make out affidavits and no notation of Tri-State membership appears. Since they did not file such affidavits, there is no statement by them concerning whether or not they signed the back-to-work petition. As to the two remaining persons whom these exhibits show to have been reemployed, there is no notation of Tri-State membership and their affidavits disclose that they did not sign the back-to-work petitions. It appears in both cases, however, that these two men were not and had not been members of the International.

Further, there is primary evidence that those persons who did obtain employment with the respondents either first became members of the Tri-State Union or thereafter became members. The only persons other than supervisory employees who were employed by the respondents after the strike and who testified were Board witnesses. All were members of the Tri-State Union. Sam Gaskill, who was not a claimant, testified that he returned to work in the paint department at the Lead Company immediately on the Joplin plant's reopening. He was not a member of the Tri-State Union at the time. Shortly thereafter, however, all employees in the paint department were summoned, during working hours, to attend a meeting in the plant cafeteria where Kelsey Norman addressed the employees concerning membership in the Tri-State Union. Gaskill immediately joined.⁸⁹ This incident is undenied by the respondents. Joseph Mallatt, who obtained employment at the Galena smelter after the strike, became a Tri-State member immediately thereafter. H. E. Bridges, who obtained employment at one of the respondent Mining Company's mines in April 1937, joined the Tri-State Union shortly before he resumed his work. Timothy Rayon, who was reinstated by the respondent Lead Company on September 9, 1935, had obtained a temporary membership in the Tri-State Union a few days before that date. Olay Dodd resumed employment at the Joplin plant on its reopening immediately after having obtained a temporary blue card—evidence of temporary membership in the Tri-State Union. Albert Plummer was reinstated at the respondent Mining Company's Ohio mine on March 10, 1937. In the same month he had become

⁸⁸ The evidence shows that these petitions were presented to the respondents at the time of the back-to-work movement. Moreover, signing the petition by the petitioner's own terms automatically involved "resignation" from the International.

⁸⁹ Instances of employees who refused to join and were thereupon discharged are discussed below.

member of the Tri-State Union. James H. Roper resumed work for the Mining Company in August 1935, after becoming a Tri-State member. J. D. Hughes was reinstated at the Bendelari mine November 4, 1935, 10 days after he applied for and obtained a temporary blue card. Each of the individuals named above had been members of the International before they joined the Tri-State Union. Besides this numerical indication that all those who obtained employment with the respondents were, or shortly became, members of the Tri-State Union, there is evidence of the direct pressure, other than that described above, exerted by the respondents upon their employees to force them to join the Tri-State Union. The respondents did not call any of their employees who were members of the Tri-State Union to explain the circumstances of their membership herein. Nevertheless, the extent to which the respondents exerted such pressure plainly appears from the testimony of John Sheppard, former supervisory employee of the Lead Company. In August 1935, Sheppard was acting director of research at Joplin with approximately 26 research chemists under his supervision. He testified that on August 27, 1935, Leonard Vaughn, the general manager of the Joplin plant, summoned Sheppard to his office, where he told Sheppard that the Eagle-Picher companies wanted the employees to join the Tri-State Union. Vaughn urged Sheppard to take action toward recruiting the research employees into the Tri-State Union. He told Sheppard that such steps were necessary since it was difficult to keep the employees in the plants, mines, and smelters in the Tri-State Union if the research employees remained outside the Union. Vaughn stated that it would be difficult for the Tri-State Union to be maintained if the research men were held out of the laboratory, and that if the research men did not join there was grave danger of violence to them at the gates from members of the Tri-State Union. Although Sheppard was reluctant to press his men to join the Tri-State Union, he posted a notice on the laboratory bulletin board, dated August 27, 1935, which stated:

An official of the . . . Tri-State Union called on me Friday, August 23, in the interest of the union. Today, through Mr. Leonard Vaughn, manager of our Joplin plant, I received information regarding the same union, to the effect that this is a union not inimical to the policy of our company. Consequently, today application blanks of membership in the aforesaid union

Shortly before this, officers of the Tri-State Union had expressed concern at the fact that the laboratory employees had not joined. Thus, the minutes of the Tri-State Union, Paper Association No. 1, dated August 23, 1935, record that, "F. W. Evans, president of the union, was present and made a report on his conference with Mr. Sheppard . . . relative to enrolment of laboratory workers in the union."

will be distributed to all employees of the research department. . . .

On August 28 Sheppard reported to Vaughn that he had distributed the membership applications. On the same day Sheppard wrote a letter to J. R. MacGregor, vice president of the Lead Company and in charge of the research department, in Cincinnati. In this letter, Sheppard expressed concern over the necessity of joining the Tri-State Union and protested having to force his employees to join. He wrote:

The present situation had its origin as inquiries I have made reveal, in an attempt over a month ago to force acceptance of labor union membership of the research employees. . . . Recently talk has got around that a move is going to be made to force our men in the union . . . either by direct action or by indirect means. What makes immediate communication with Cincinnati imperative is the outcome of a conference I had with Mr. L. Vaughn at the instance of the latter. Briefly the outcome of that conference was a somewhat veiled intimation that every employee of the research department was going to be required to take out membership in the union and I was to make it plain that membership is obligatory. . . . Our men will unquestionably join any labor union they have to join if they are told they must do it to keep their jobs. There is no use pretending, however, that their feelings are otherwise than they are. Likewise I will deem it my duty to carry out the wishes of the management if they be to make membership in a labor union a condition for employment in the research department.

On the same day, Sheppard sent MacGregor a second letter, containing a petition signed by each employee in the research department with a single exception, in which these employees expressed their desire not to join the Tri-State Union; and asking the management "not to cause us to join the said labor union." On the following day, MacGregor telephoned Sheppard and instructed him that membership was not compulsory and that Sheppard should hold matters until MacGregor's arrival in Joplin on September 2.

After MacGregor's arrival in Joplin on September 2, he held several conferences at which, according to Sheppard's testimony, MacGregor was "sort of indefinite." MacGregor, however, reprimanded Sheppard for having kept written records of the controversy since such records might be disadvantageous to the respondents.

On September 6, MacGregor wrote letters to the research department employees stating:

It is our opinion that the question of becoming a member is a matter which rests entirely with the individual and the membership committees. The management has no requirement that any employee must belong to any organization of any nature.

Several of the research-department employees showed this letter to Sheppard, who had not been sent one. Sheppard immediately wrote MacGregor approving MacGregor's letters and stating that he as well as the men appreciated them.

The matter was not, however, allowed to rest there. Between September 6 and 17, Kelsey Norman, the attorney for the Tri-State Union, requested Sheppard for permission for Norman and Evans to address the research department. On September 17, Sheppard wrote MacGregor, reporting Norman's request and stating:

I should like to know whether it is agreeable to the management for me to grant this request, or otherwise. Ordinarily, I should not entertain for a moment the request of the union organizer to hold a meeting within the premises and time of the Research Department, for reasons you are familiar with. I deem it proper to seek the decision of the Management.

In the same letter, Sheppard urged several reasons for refusing the request. Nevertheless, on or about September 23, MacGregor telephoned Sheppard and instructed Sheppard to permit the meeting. On the same day, Sheppard posted notices on the bulletin board announcing that the meeting would be held on September 25.

Meanwhile, between September 17 and 23,²⁸ George W. Potter, vice president of the Mining Company, called Sheppard to his office and told him that the Lead Company wanted Sheppard and the employees under him to join the Tri-State Union. Sheppard replied that although he would not stand in the way of the research-department employees' joining the Tri-State Union, he refused to compel them to join. Potter argued that it was difficult to keep other employees in the Tri-State Union as long as the laboratory workers were permitted to stay out. Potter then told Sheppard that it was Sheppard's duty to have his employees join the Tri-State Union, and that this had to be brought about without leaving any records. Sheppard protested that since Potter was an officer of the Mining Company, Potter had no authority over him or the research department, which was attached to the Lead Company. Sheppard told Potter that any such instructions to him must come from the Lead Company and that he would check on Potter's authority.

²⁸ The respondents' renewed efforts to compel the laboratory workers to join the Tri-State Union coincided with the Tri-State Union's interest in the matter. The minutes of a meeting held on September 20, 1935, of the Jasper Association of the Tri-State Union report that "General Counsel Kelsey Norman reported . . . upon the status of the laboratory men, and the attitude of Mr. Sheppard."

Thereafter, Sheppard telephoned MacGregor in Cincinnati. MacGregor told Sheppard that Potter was in charge of labor relations in the district and that Sheppard was to follow Potter's instructions in these matters. On September 23, MacGregor wrote Sheppard stating that Norman should be permitted to "visit" the laboratory and confirming his prior statement that "Mr. Potter, while the strike is on, is in entire charge of all matters involving employment of our entire district."

On September 25, Sheppard wrote MacGregor that he had informed Norman that permission had been granted for Tri-State Union representatives to address the laboratory workers. Sheppard also wrote in this letter:

In assuring you that I will carry out Mr. Potter's instructions, I wish to say that the latter, judging by what he has told me of them, will include instructions which I feel are not in the interest of good working of a research department, and which will render your letter of September 6 to our men⁹⁹ null and void. In this, I admit of course, he is within his rights.

Norman addressed a meeting of the research department on September 25. The meeting began at 11 a. m. and lasted to between 1 and 2 p. m. It took place within the plant, and although it was during working hours the wages of the employees were not deducted for the time lost. Norman spoke in favor of the Tri-State Union and stated in substance¹⁰⁰ that the Tri-State Union had the cooperation of Eagle-Picher; that although the companies did not demand that anyone join the Union, they did not employ non-members; that the Tri-State Union was organized to keep the International out; that the company would be pleased if the employees joined since it was "intensively interested in keeping this organization going"; that the Tri-State Union had a preferential-shop contract with the respondents and was recognized as exclusive agent of the "mines and smelters"; that a certain employee who had joined the Tri-State Union but had begun "talking a lot . . . and caused a dissention (sic) among the workers" had been fired "for the good of the morale," that "Eagle-Picher wants everyone to join this Union" and that as a matter of loyalty to the company the employees should join; and that if the Tri-State Union were not kept alive and the International Union not kept out, the smelters would close down and "you would have to look for a job some place else." After

⁹⁹ This was a reference to the letters addressed by MacGregor to the individual laboratory employees alleging that they were free to join or not to join the Tri-State Union.

¹⁰⁰ A stenographer was present and at Sheppard's direction, took notes at great length, though not entirely verbatim, on Norman's remarks. Sheppard read and checked these notes directly after they were transcribed and testified at the hearing that they were substantially correct.

Norman's address, the meeting was thrown open for questions in the course of which the laboratory employees clearly demonstrated their suspicion of Mike Evans and of the bona fides of the Tri-State Union, and their extreme reluctance to join the Tri-State Union.¹⁰¹

Immediately following this address, Sheppard summoned each laboratory unit department head individually into his office and informed each one that "we had to join the Union," that Sheppard "was being forced to join and that all of us had to join," and that each department head "was to go to his men individually and inform him of that." Thereupon the research employees filled out application blanks and were received into the Tri-State Union. On September 26, Sheppard wrote Potter stating that Sheppard had been notified "by Cincinnati" of Potter's authority in the premises, that Sheppard would carry out Potter's instructions, and that "I am assuming that those instructions you gave me recently before I had been supplied with the foregoing information are still intended to stand. Based on that assumption, I have carried out these instructions."

The respondents failed to introduce substantial evidence to refute Sheppard's testimony or the documentary proof of this series of events. The principal actors, Potter, MacGregor, and Norman¹⁰² were not called to testify by the respondents. The only witnesses called on by the respondents to refute Sheppard's testimony were H. R. Harner and Leonard Vaughn. Harner was assistant research director of the laboratory at the time of the hearing and had been in 1935 the head of the storage-battery division of the research department. Harner denied that any representative of the respondents had ever required him to join the Tri-State Union or that he ever heard that there was such a requirement. He admitted, however, that, during the period in question, he joined the Tri-State Union. He assigned as the reason for joining the fact that "it appeared that there might be trouble around the plant from some hot-heads, and preferring to keep things smoothed over, I joined the union." Harner, on cross-examination, testified that he "probably" signed the petition addressed to the management and described above. This

¹⁰¹ Testimony of Norman's speech was admitted by the Trial Examiner as original evidence only. We shall observe this limitation even though we believe the Trial Examiner was in error. Nevertheless, by placing their stamp of approval on this speech through granting permission for its being made on company time and property and by their complete cooperation with Norman and the Tri-State Union in this matter, the respondents are responsible for the coercive effect which this speech had upon the laboratory employees.

¹⁰² MacGregor was no longer employed by the respondents but was working in Chicago at the time of the hearing. The respondents' counsel stated that MacGregor could not appear at the hearing without serious loss to his business interests. The Trial Examiner then stated that hearings could be held on a Sunday so that MacGregor could fly to Joplin. Thereafter, the respondents' counsel stated that MacGregor would testify. MacGregor, however, did not appear. Norman was present at the hearing. Potter was in Joplin during the hearing.

petition, which we find was signed by Harner among others, stated that "we have heard many rumors that we may be required to join" the Tri-State Union, and refutes Harner's denial that he had ever heard of such a requirement. Further, Harner recalled Norman's address to the research employees, and that this meeting occurred shortly before Harner joined the Tri-State Union. Harner testified that he did not recall that Sheppard called him into his office and told him that he had to join the Tri-State Union. He testified, however, that he would not deny that such an incident occurred.

Vaughn's testimony concerning this incident was also evasive and unsatisfactory. He testified that in the summer of 1935 he had heard rumors that certain employees excepted to the failure of the research men to join the Tri-State Union and that the research men might be stopped at the gate and be refused admittance. Fearing violence, Vaughn accordingly summoned Sheppard to inform him of the situation. Vaughn, who was the general manager of the Lead Company's Joplin smelter, told Sheppard that he had no authority over Sheppard and that he "could not assume any responsibility for the welfare of his [Sheppard's] men." When, according to Vaughn, Sheppard asked whether Vaughn was directing him to compel the laboratory workers to join the Tri-State Union, Vaughn testified that he replied that he "was not telling him that he had to do anything; that he was free, white and 21, and he could write his own ticket and that was his job." On cross-examination, Vaughn was unable to recall where or from whom he had heard rumors of violence at the gate against the laboratory employees. Vaughn admitted that he was in control of the Joplin plant, in which the research department was located, that he had authority to protect the property and personnel at the Joplin plant, and that he did post special guards at the gate for such protection. Vaughn was unable to explain why it was necessary for him to shift to Sheppard the responsibility for protecting the 26 laboratory employees from violence at the gate when Vaughn had already posted 20 special guards to protect the other 275 employees at the same plant.¹⁰³

Under all the circumstances, and in view of the respondents' failure to call the principal actors in this incident, we do not consider that the evasive and inconsistent testimony of Harner and Vaughn refutes the testimony of Sheppard and the unimpeached documentary evidence presented in connection therewith. We find that this series of events occurred as testified to by Sheppard and as established by the documentary evidence. We further find that the respondents' conduct in

¹⁰³ On redirect examination, and in answer to a leading question, Vaughn attempted to clear up this inconsistency by testifying that the violence which he feared might occur before the laboratory employees reached the gate on their way to work. We do not credit this explanation.

directing Sheppard to order his employees to join the Tri-State Union was not an isolated incident confined to this single department.¹⁰⁴ It is apparent from the testimony concerning this matter that the respondents were careful to avoid keeping or to destroy records of their illegal conduct and, to some extent, to give a surface appearance of permitting their employees a free choice to join or refrain from joining the Tri-State Union. Sheppard was the only one who testified who was no longer employed in the Tri-State District or by the respondents. Without obligations to the local operators or the respondents, he was free to draw a clear and convincing picture of the respondents' policies in relation to membership in the Tri-State Union. From the fact that the respondents exerted such strong pressure upon the laboratory employees to join the Tri-State Union, we may properly and do, infer that similar coercion was exercised against the ordinary production employees. Since it was to "keep in line" the latter that these events occurred, we regard the incident as typical of the respondents' conduct during this period, and it is in the light of this incident that we consider the testimony regarding the respondents' employment policy and their requirement of membership in the Tri-State Union.

(3) Statements of supervisory employees and others concerning conditions of employment

Separate and apart from the evidence of the requirement by contract of membership in the Tri-State Union, and from the evidence of coercion by the respondents directed against employees who had not yet joined the Union, the record is replete with evidence that supervisory employees told prospective applicants for reinstatement either that their activities on behalf of the International precluded them from reinstatement or that membership in the Tri-State Union was a condition precedent to reemployment. Approximately 50 witnesses for the Board testified to such statements made by Campbell, by Vaughn, by Frudenberg, by Bailey, by Ritter and by other supervisory employees.¹⁰⁵ Typical testimony concerning such statements follows.

Ulyes Bradbury testified that on or about June 15, 1935, Ritter and Bailey asked him whether he wished to return to work. Bradbury replied in the affirmative, but when Bailey announced that a blue

¹⁰⁴ As described above, it was during this same period that a great majority of the supervisory employees who testified joined the Tri-State Union.

¹⁰⁵ The precise dates of some of these statements do not appear. However, we regard such statements as relevant to the question of the blue-card requirement, whether they were made before or after the effective date of the Act. The respondents claim that there was no blue-card requirement at any time, but they do not assert, and the record does not show, that there was any change in the respondents' policy in that regard after July 5, 1935. It affirmatively appears, in fact, that there was no such change. Accordingly, statements concerning the blue-card requirement have probative value whether made before or after July 5, 1935.

card¹⁰⁶ was necessary, Bradbury demurred. Bailey replied that unless Bradbury obtained a blue card he would never work another day for the respondents.¹⁰⁷ Elmer Tinkler, chairman of the International's Mining Committee, testified that in July 1935, he asked Bailey for reinstatement. Bailey answered, "You will have to get on the right side of the fence first. . . . You will have to get a blue card." Bailey asked whether Tinkler had picketed and Tinkler replied in the negative. Bailey next asked whether Tinkler had served on any committees, and when Tinkler told Bailey that he had, Bailey stated, "No one that is on any committees or in any office will never work for the Eagle-Picher Company." Guss Cooper testified that in July 1935 Bailey told him that "I had been too hot during the strike, and also I was too good a union man to ever get back on in the Tri-State district. And also, he said . . . he would see that I never worked in the Tri-State district."¹⁰⁸

Winth Jervis testified that in the spring of 1937, he asked O'Dell about obtaining employment at the respondent Mining Company's Mary N. Beck mine. O'Dell replied that Jervis could work if he received a blue card, and assured Jervis that he could get such a card "provided you haven't been too red-hot an International man."

H. E. Bridges testified that in April 1937, while working for the respondents, he was summoned by O'Dell, who told Bridges, "I am letting you go . . . it is not because of your work . . . You are as good a man as I have got but I don't know as I have to tell you at all what it is about, but I will tell you. You have been doing too much talking about the C. I. O. You know a little bit too much about it and for that reason I am letting you go."¹⁰⁹

Harry L. Rice testified that on June 27, 1935, he had a conversation with Geddes, superintendent of the oxide department at the Galena smelter, concerning returning to work. Geddes replied that another person had filled Rice's job and that the other man was "the only one qualified for it." When Rice asked in what respect he was not qualified, Geddes replied "Everything but the blue card."

George White testified that in July 1935, he asked Vaughn about reemployment with the Lead Company. Vaughn answered, "No. Your neck is a little too red¹¹⁰ to go to work again as long as I am manager of this plant." John Mays testified that he spoke to Vaughn

¹⁰⁶ A blue card is the indicia of membership in the Tri-State Union.

¹⁰⁷ James Thompson also testified that Ritter and Bailey, in their back-to-work tour in May or June, stated that if Thompson did not join the Tri-State Union and go back to work immediately, he never could work again for the respondents.

¹⁰⁸ Others who testified to similar remarks made by Bailey, or to Bailey's statements concerning the necessity of blue cards, were N. J. Pettit, Luke A. Griffith, Henry Bloom, William Bryant, and Ralph Henderson.

¹⁰⁹ These incidents were uncontroverted. O'Dell was not called by the respondents.

¹¹⁰ "Red-neck" was the common description applied in the Tri-State area to active International members.

about going back to work in July 1935, that at first Vaughn's replies were favorable, but that on the day following Mays' attendance at an International meeting, Vaughn asked Mays whether he had attended the meeting. When Mays said that he had, Vaughn told him, "Well we can't use you, we have to have men that's for the company. We can't have men that's playing both sides."¹¹¹

Raymond Danel testified that in September 1936 he spoke to Hallows about reinstatement, and that Hallows asked whether Danel was a member of the International. When Danel answered that he was, Hallows said, "I can't do anything for you because we don't work International men."

Clifford Doak testified that late in June 1935, DeWitt, his ground boss, told him that Doak would "never work for Eagle-Picher as long as he carried an International card," and that a blue card was necessary for reemployment by the respondents.¹¹²

Kenneth L. Howe testified that in August 1935, Frudenberg told Howe that he was unable to use him and that Frudenberg "had no use for those that went out and picketed." P. M. Brooks testified that in July 1935, Frudenberg told him that a blue card was necessary and stated, "Do you think that the company would hire a man that stayed away as long as you have and hung around these 'reds' at Picher?"¹¹³

Ernest Tennis testified that in the spring of 1937, he applied to Newby for reinstatement. Tennis testified that Newby asked "if I was in on any of them riots, or anything that had taken place, and I told him I wasn't. And he said 'Well, I will find out.' So he went to his papers and books and looked through them and said, 'Well, I can't find anything against you, so come back day after tomorrow, and I will give you an answer.'" When Tennis returned 2 days later, Newby refused to issue a card to him. George Messer testified that sometime after the strike, Newby told Messer that he had been "black-balled . . . for union activities, for being right down at the union hall agitating, pushing things all you knew how and also talking in the mills at all times."¹¹⁴

John Basnett testified that DeMier made statements similar to those set out above; Arch Underhill testified that Foster Mays did also; similar testimony was given by W. C. Novak, J. D. Hughes,

¹¹¹ Others who testified that Vaughn told them that an International member could not obtain employment, or that a blue card was necessary, were Roy Bray, Timothy Rayon, and Chauncey Mitchell.

¹¹² This testimony was undenied. DeWitt was not called on to testify by the respondents.

¹¹³ Other witnesses who testified that Frudenberg made similar statements or statements that a blue card was necessary were John Millner, Ray Mayfield, A. G. Black, and Grant Cavin.

¹¹⁴ Others who testified to statements by Newby that International activities were a bar to reemployment or that a blue card was necessary were E. Q. Messer, Roy Cottongin, E. K. Eagle, and F. F. McIntire.

Everett Faires, and H. L. Freeman concerning Joe Pruitt; by S. O. White and James Thompson concerning Keithley;¹¹³ by Joshua Roberts, Roy Bray, Tim Rayon, Claude Dalton, Chauncey Mitchell, and Orven Blinzler concerning George; by Walter Parmer concerning Carl Juergens; by A. O. Plummer concerning Marcus; and by W. S. Fulkerson and Ed Blackourn concerning Campbell.

Except as noted above, and except in the case of testimony concerning statements made by Pruitt, who had died before the hearing, all the supervisory officials either expressly or generally denied the statements attributed to them by these witnesses. We are aided in the resolution of this conflict of testimony by the probabilities inherent in the situation. As described above, the respondents had pursued a strong policy of hostility toward the International and of concrete as well as moral support to the Tri-State Union. Further, the respondents had entered a virtual closed-shop contract with the Tri-State Union and had exerted strong pressure even on the research employees to join the latter organization. Finally, most of the supervisory employees to whom these statements were attributed were themselves members of the Tri-State Union. Some of them, as described above, had testified to their keen interest in and support of its policies. DeWitt, Bailey, Keithley and Pruitt, principal actors in many of these conversations, were particularly active in Tri-State Union affairs and served on its executive committee. Under these circumstances, and in view of the consistent pattern painted by the various witnesses for the Board who testified to these statements, we find that they were made substantially as described above by these witnesses. We find, therefore, that the respondents' supervisory employees, during 1935, 1936, and 1937 announced, on behalf of the respondents, that active International members would not be employed by the respondents and that a blue card was necessary in order to obtain employment with the respondents.¹¹⁴

¹¹³ Keithley was not called upon by the respondents to testify. The statements attributed to him are undenied.

¹¹⁴ Such statements by these supervisory employees were supplemented by similar and repeated statements, other than those concerning the contract, in the Blue Card Record. Thus in the issue dated October 5, 1935, there appeared: "And if you are not a striker, agitator or so and so, They'll give you a card and put you to work. Hurrah for Mike and Joe." On January 4, 1936, the paper reported, "the fact that all the mining companies in the district are now requiring their employees to be members of the Tri-State accounts for an unusually large number of applicants for membership in the Union during this past week . . ." An editorial on August 15, 1935, stated: "The plight of these die-hards [those who had not joined the Tri-State Union] is desperate. They . . . find practically every mine and smelter closed to them. They are faced with the alternative of getting into another line of work or leaving the district . . ." On May 7, 1937, an editorial referred to a "very few chiseling operators" who "have been very incautious about working Internationalites and non-Blue Card members. For the protection of our organization . . . this chiselling and cheating must stop." As described above, this paper was widely read by the respondents' officers and its statements were never repudiated by them. As stated above, we find that the respondents authorized and approved these statements.

Conclusions in respect to the respondents' employment policies after the strike.—From the evidence described and the facts found above, we conclude that the respondents' consistent policy was to deny employment to active International members and to require membership in the Tri-State Union. There is no evidence, and the respondents did not attempt to show, that after the Tri-State Union became the Blue Card Union such policy was changed.¹¹⁷ Under the circumstances, the presumption of continuance of a known state of facts is applicable to the instant situation, and we therefore also conclude that the respondents required membership in the Blue Card Union. Finally, we conclude that the respondents in effect used the Tri-State and Blue Card Unions as employment agencies, and that the respondents, by these Unions' policy of excluding all members suspected of sympathies for the International, as described above, further weeded out International members.

We find that by the acts and conduct described above, the respondents have interfered with, restrained, and coerced their employees in their exercise of the rights guaranteed in Section 7 of the Act.

The respondents, however, contend that they were not guilty of discrimination in regard to hire and tenure, within the meaning of Section 8 (3) of the Act, since the persons named in the complaint were not employees as defined in the Act. In their second amended and substituted answer the respondents aver

that the cessation of work . . . and the resumption of operations . . . were all prior to the effective date of the National Labor Relations Act . . . ; and there was on the effective date of said National Labor Relations Act no labor dispute . . .

In the exceptions, the respondents further urge that

—on or after July 5, 1935, the former employees of the respondents, who were employed by the respondents at the time of or prior to the strike of May 8, 1935, but who had not returned to such former employment, had ceased to be employees within the meaning of the National Labor Relations Act.

We believe that the legal issue thus raised has been resolved adversely to the respondents' contention. As described above, the strike began on May 8, 1935. Except for the Galena smelter and the Big John mine, which did not reopen until on or about July 16, 1935, the respondents resumed operations on or about June 10, 1935. Although the respondents contend that their operations were completely manned before July 5, 1935, the effective date of the

¹¹⁷ The agreement between the A. F. of L. and the Tri-State Union provided that the Blue Card Union should take over "all contracts" held by the Tri-State Union. See also the editorial of May 7, 1937, quoted in the prior footnote.

Act, the evidence does not support their contention. The respondents' pay rolls for July 5 and 16-20, 1935, are in evidence. The July 5 pay rolls list approximately 595 names while the July 16-20 pay rolls list about 711 names.¹¹⁸ Comparison of the names on these two pay rolls show that 38 names appearing on July 5 do not appear on July 16, while 172 names appear on the July 16 pay roll which are not listed on July 5.¹¹⁹ Although no other pay rolls were offered, the record shows that the respondents' operations continued to expand¹²⁰ after July 15, 1935. Thus at the end of July 1935, the Central Mill added a third shift. Frudenberg, the superintendent of the Central Mill, testified, and we find, that when the mill reopened, only 45 or 50 men were employed, that a full crew consisted of 80 or 90 men, and that "I don't think the mill got under full load until the first of 1936, to my recollections." Production is at its lowest ebb in July, and is not at its peak until winter and spring. That a substantial number of employees were added after July 1935 is shown by examination of a "labor survey" prepared by the respondents and containing the number of men employed from day to day throughout the period in question. This survey shows that on July 5, 1935, 498 men were employed and on November 1, 1935, 864 men were employed.

We find, therefore, that the respondents had not before July 5, 1935, reached the absorption point in their normal employment requirements, but that on and after July 5, 1935, they had jobs available at least to the extent indicated by the above figures.

Further, it affirmatively appears that the strike which had begun on May 8, 1935, was still in effect on July 5, 1935. The conferences between International representatives and Potter, on July 6 and 16, were clearly predicated on the assumption that the strike was then in existence, particularly since the undenied evidence is that the discussion centered around the settlement thereof. Undenied testimony establishes that Potter himself considered on July 16, 1935, that the strike was still in progress since he urged that the striking employees be returned to work by the International Union's committee. Further, J. R. MacGregor, the respondent Lead Company's vice president, wrote to Sheppard on September 23, 1935, in response to Sheppard's inquiry concerning Potter's authority over him, that

¹¹⁸ There is some confusion arising from the fact that some of the operations at the Galena plant, prior to its reopening, were transferred to the Joplin plant. On both pay rolls of July 5 and 16, several names appear on the Joplin pay roll but are listed as "Galena." There is, however, a separate pay-roll list on these dates for Galena, and the names appearing in this do not coincide with "Galena" men on the Joplin pay roll. Excluding the Galena pay roll, approximately 625 names appear on the respondents' July 5, 1935, pay roll and 681 on July 16.

¹¹⁹ This includes 88 names on the Galena pay roll of July 20 which were not on the pay roll of July 6.

¹²⁰ On May 8, 1935, the respondents had approximately 1,100 names on their pay roll.

... this letter . . . also confirms my statement that Mr. Potter, while the strike is on, is in entire charge of all matters involving employment . . .¹²¹

Picketing continued throughout 1935, and the strike, up to the time of the hearing, had never been formally terminated. An International membership book belonging to one of the respondents' striking employees, placed in evidence, contained strike stamps up to the date of the hearing.

We find, therefore, that the strike was still in effect on July 5, 1935. Under these circumstances, it is settled that strikers do not forfeit their protection under the Act by reason of the fact that the strike was begun before the effective date of the Act. In *Matter of Carlisle Lumber Company and Lumber & Sawmill Workers' Union, Local 2311*,¹²² the strike began on May 3, 1935, and continued after July 5, 1935. After July 5, the company imposed illegal conditions on a return to work by the striking employees. The United States Circuit Court of Appeals for the Ninth Circuit rejected the company's contention that the Act did not apply to these employees, stating:

It is clear here, that at the time of the unfair labor practices, there was a current labor dispute. It is likewise clear that the individuals, that is, the union employees, ceased their work to sustain their position in the controversy. Under the Act, therefore, the union members were "employees."¹²³

A similar situation existed in *Matter of Jeffery-DeWitt Insulator Company and Local No. 455, United Brick and Clay Workers of America*,¹²⁴ where the strike began on June 15, 1935, and continued after July 5, 1935. Again the company contended that the strikers had lost their status as employees prior to July 5, 1935, and that therefore the Act was inapplicable. The United States Circuit Court of Appeals for the Fourth Circuit held to the contrary, stating:

The record shows clearly that a current labor dispute existed. . . . It has long been recognized by the law, as well as common understanding, that the relationship of employer and employee is not necessarily terminated by a strike. . . . Irrespective of the statute, therefore, the strike did not of itself result in a complete severance of the relationship which had been established between the company and its employees, and this situation was not ma-

¹²¹ Italics supplied.

¹²² 1 N. L. R. B. 248.

¹²³ *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138, 145 (C. C. A. 9th, 1937), cert. den. *Carlisle Lumber Co. v. National Labor Relations Board*, 304 U. S. 575 (1938).

¹²⁴ 1 N. L. R. B. 618.

terially changed by the resumption of operations on June 20 [1935], even though the company announced that those employees who desired to work must go to work on that day.

The mere fact that the labor dispute had commenced prior to the passage of the Act does not withdraw the parties or the dispute from the regulatory power of Congress as to acts subsequently occurring . . ."¹²⁵

We find, therefore, that a current labor dispute existed on and after July 5, 1935, and that the strikers retained their status as employees within the meaning of the Act at all times after May 8, 1935.¹²⁶

The respondents' second chief contention is contained in its answer amended during the hearing. Such answer avers:

That said persons appearing in Schedule "A" on May 8, 1935, struck and refused to continue in respondents' employ and have at all times maintained and pursued said strike,¹²⁷ and failed

¹²⁵ *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th, 1937), cert. den. 302 U. S. 731 (1938).

¹²⁶ Board's counsel, apparently in order to show the steps taken by the respondents to break the strike, placed in evidence letters, dated June 22, 1935, and addressed to Inter national members still on strike. These letters were sent by the Lead Company to such members who had worked at the Joplin plant, and stated: "You are requested to remove your personal property from the company lockers . . . and withdraw any deposits due you before June 29th, 1935. The lockers of all former employees will be vacated on that date." The Lead Company also sent notices on June 22 to strikers that their insurance certificates would be cancelled as of July 1, 1935. The respondents adduced no evidence concerning these letters, and they did not contend in their answer or exceptions that they were considered to have operated as an actual discharge; nor do the respondents rely on these letters in their contention that all persons named in the complaint had lost their employee status. Further, the evidence shows that at least some of the recipients of these letters who continued on strike were subsequently reinstated on accounts, blue cards. Under these circumstances, we hold that these letters were merely intended as a strategic device to hasten the return to work, and that the strikers were not discharged by the respondents. Cf. *Matter of Biles-Coleman Lumber Company and Puget Sound District Council of Lumber and Sawmill Workers*, 4 N. L. R. B. 679, enforced in *National Labor Relations Board v. Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 98 F. (2d) 16, 18 (C. C. A. 9th, 1938). In any event, in the *Carlisle Lumber* case, cited above, a strike occurred before the Act and continued thereafter. On June 25, 1935, the company announced to its employees that "We have closed our pay rolls which automatically discharges all of our former employees excepting those now employed . . ." In affirming a Board decision that the employee status was not thereby lost, the United States Circuit Court of Appeals for the Ninth Circuit said:

"Respondent also contends that it had discharged all employees on June 25, 1935 . . . that it had the unquestioned common law right to do so, and therefore it had no employees when the act became effective. . . ."

"There is no limitation in the statute that individuals whose work has ceased as a consequence of a current labor dispute are employees only if they were not discharged prior to the effective date of the Act. The reading into the statute of such a limitation would constitute an abuse of power. *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138, 145 (C. C. A. 9th, 1937), cert. den. *Carlisle Lumber Co. v. National Labor Relations Board*, 304 U. S. 575 (1938). See also *Matter of Standard Lime & Stone Company v. National Labor Relations Board*, 97 F. (2d) 531 (C. C. A. 4th, 1938). Furthermore, we find that even if the respondents' action could be construed as an actual discharge of the strikers, the discharge was caused by the men's participation in the strike."

¹²⁷ It is to be noted, of course, that this averment is inconsistent with the respondents' contention that the strikers had lost their employee status.

to apply for reemployment or to make any reasonable or timely application therefor, and as a result said persons are barred by laches and are estopped to assert that respondents refused to reinstate them.

The respondents' contention that failure to apply for reinstatement precludes employees from obtaining reinstatement or other remedy under the Act, and precludes the Board from a finding of discrimination, has also been rejected in prior cases. In the *Carlisle Lumber Company* case,¹²⁸ following a strike, the employer reopened his plant and notified the strikers that as a condition of returning to work they must renounce "any and all affiliation with any labor organization." As a result, few union members made formal application. The Board held that such failure to apply did not bar a finding that the employer had violated Section 8 (3) of the Act, stating:

To say that because they have not made application to go to work they were not refused employment would be to place a penalty upon them for not doing what they knew would have proved fruitless in the doing. The respondent's illegal conduct in publishing the aforesaid notice precluded all possibility of employment and relieved them of the necessity of making a formal application. Nor is it an answer to say that they were striking and would not have applied in any event. That was for them to decide. Furthermore, under the Act an employee cannot be required to renounce his union affiliation as a condition of employment.

The Board has applied the same rule where the unlawful condition attached to reinstatement was joining an employer-favored union.¹²⁹

We find that such reasoning is peculiarly applicable to the instant situation. The respondents had signed a contract barring International members from employment, and the existence of this contract was publicized by the Tri-State Union paper with the knowledge and approval of the respondents. The requirement of membership in the Tri-State and Blue Card Unions was similarly publicized and known throughout the district. Approximately 50 claimants in this case were told by the respondents' supervisory officers that a blue card was necessary for reemployment. Some 25 or 30 of these claimants applied for work,¹³⁰ and were refused be-

¹²⁸ Cited above and Order enforced in 94 F. (2d) 138 (C. C. A. 9th, 1937).

¹²⁹ *Matter of Jacob A. Hunkeler, trading as Tri-State Towel Service and Local No. 40, United Laundry Workers Union*, 7 N. L. R. B. 1276; *Matter of the Grace Company and United Garment Workers*, 7 N. L. R. B. 786; Cf. *Matter of Sunshine Mining Company and International Union of Mine, Mill and Smelter Workers*, 7 N. L. R. B. 1252.

¹³⁰ The respondents claim that, because of the rustling-card system, applications could be made only to Campbell, George or Vaughn. As already described, however, the superintendents, ground bosses, and foremen had ultimate power of picking men and assigning

cause they were members of the International or because they did not have a blue card. Supervisory employees who passed on applications for reemployment were themselves members of, and actively interested in, the Tri-State and Blue Card Union. Potter informed union representatives who sought to settle the strike that it was "too late" since a contract had been entered into with the Tri-State Union. Every one of the approximately 200 claimants who testified stated, and we find, that it was their understanding that a blue card was necessary for reemployment, or for retaining employment.

Under these circumstances, we find that the striking employees were under no obligation to make the useless gesture of applying for their jobs.¹³¹

We have found that on or about June 8, 1935, the respondents imposed as a condition of obtaining or retaining employment abandonment of membership in the International¹³² and further required membership in the Tri-State Union. We have also found that, through its agency, the Tri-State Union, and through its supervisory officers, the respondents further required as a condition of employment even of those willing to abandon the International and to join the Tri-State Union, that the employee be one who had not been active in International affairs. We have found that at no time on or after July 5, 1935, did the respondents abandon these policies. On July 5, 1935, such conduct became illegal under the Act.

Finally it appears that, although after May 8, 1935, the respondents did decrease the number of men whom they employed, the members of the International were the only large group which failed to obtain reemployment. Campbell testified, and we find, that in so far as possible and in so far as they were available, those persons who had been on the pay rolls on May 8, 1935, were rehired. Yet the pay rolls of July 5, 1935, show that 83 men had been hired by the respondents who had never before been employed by them, while 71 were on the July 5, 1935, pay roll who had been employees of the respondents at some time before, but not on, May 8, 1935. That not many of the employees as of May 8, 1935, other than the claim-

them to work. These latter supervisory employees were so situated that their refusal virtually precluded possibility of eventual work and so made further application unnecessary. For purposes of this discussion only, therefore, we regard a request to such supervisors as an "application."

¹³¹ The claimants' willingness to abandon the strike and return to work, absent the illegal condition, is discussed below.

¹³² Except as follows, all claimants who testified were members of the International on May 8 and July 5, 1935: W. E. Bond, W. S. Fulkerson, A. O. Plummer, H. L. Rice, and W. L. Simpson joined shortly after May 8, 1935; Orlay Dodd and Ulyes Bradbury participated in the strike and were identified with the International but were not members thereof; C. G. Harreld had been delinquent in his dues for over 6 months, but went on strike; Howard Wimberly had been a member and was reinstated shortly after May 8; and Alson Lamb was a member but was delinquent in his dues. All claimants who testified went out on strike.

ants¹³⁵ herein, failed ultimately to be reemployed by the respondents is evidenced by the testimony of Walter George. He further testified that although between the time of the resumption of operations and the hearing there had probably been 1,500 or 2,000 applicants denied employment, the claimants herein who applied were the only ones whom he knew. All others he characterized as "foreigners"—that is, those who had never before been employed by the respondents.

We find, therefore, that the respondents, on July 5, 1935, and thereafter, discriminated against their employees generally in regard to hire and tenure of employment and conditions of employment, thereby discouraging membership in the International and encouraging membership in the Tri-State and Blue Card Union. We further find that by imposing such conditions and thus discriminating against the claimants, the respondents have interfered with, restrained, and coerced their employees in their exercise of the rights guaranteed in Section 7 of the Act.

The respondents, however, urge several considerations in relation to various categories of employees in an attempt to show that such employees were not discriminated against. We have found that the respondents had imposed an illegal condition as against all employees. In claiming, thus, that certain factors were present which would have precluded some employees from reemployment even in the absence of the illegal condition, the respondents must assume the burden of "disentangling the consequences for which it was chargeable from those from which it was immune."¹³⁶ We have held that the respondents' own conduct made application by the claimants unnecessary. Therefore, it was not until the hearing that the respondents urged as a basis for certain of the refusals to reinstate, the contentions discussed below. The question is one involving hindsight—whether the respondents would have refused employment to these employees entirely apart from the improper practices which we have found were committed. Where two motives for refusal may have existed, one clearly improper and one a just cause for severance of the employer-employee relationship, and where the improper motive is found to have been present in general, we must require the respondents to adduce clear and convincing proof that the claimants would in any event have been refused reinstatement for proper cause entirely apart from illegal considerations. Applying such general principles, we turn to the consideration of the respondents' special contentions.

¹³⁵ Persons named in the complaint as having been discriminated against.

¹³⁶ *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862, 872 (C. C. A. 2d, 1937), cert. den. 304 U. S. 576 (1938).

(a) Claimants whose jobs were alleged to have been abolished during the strike

The respondents contend that, for various reasons, they reorganized their business during the strike and that as a result, many of the jobs existing on May 8, 1935, were no longer available after the return to work. The evidence shows that certain mines, such as the Tulsa-Quapaw and Grace B mines, were sold before July 5, 1935, and were not operated by the respondents thereafter; that shortly after the strike, the National Industrial Recovery Act, under which the respondents were operating a 40-hour week, was declared unconstitutional by the United States Supreme Court, and that on resumption of work, the respondents returned to a 48- or 56-hour week, thereby dispensing with many jobs; and that changes in operations after May 8 and before June 15 ended a miscellany of other jobs. The Trial Examiner found that certain employees claimed by the respondents to have been engaged at such jobs on May 8, 1935, were not discriminated against since on and after July 5, 1935, their jobs had been abolished and work was no longer available to them.¹³⁵ To these findings and conclusions the International has excepted, and we find merit in such exceptions.

In his testimony, Campbell characterized many of the claimants as "N. R. A. swing men," "N. R. A. extra men," and "extra" men. The characteristic of such "N. R. A." employees was their irregular employment. In the case of "N. R. A. swing men," although a full 40 hours were worked each week, the men worked on a different shift each day. In the case of "N. R. A. extra men," the work was merely to "fill out" the gaps in continuity, and the men worked when they could. In rebuttal, many of the employees so characterized by Campbell¹³⁶ denied that they were "N. R. A." men or extras.

We do not find it necessary, however, to resolve the difficult issues of whether or not a particular employee was an "N. R. A." or "extra" man, since we are convinced that the label is at least in part fictitious and has no particular significance for purposes of this case. The evidence shows that, prior to May 8, 1935, the choice of employees to be assigned to the extra work required by the N. R. A. was wholly unrelated to ability or seniority. Campbell testified that "N. R. A." crews were made up partly of old employees, partly of new ones put on at the time the N. R. A. so required. Many of the "N. R. A. men"

¹³⁵ Such persons are listed in footnote 6 above. The Trial Examiner did not find that jobs were abolished as to a few employees concerning whom the respondents had so claimed at the hearing. The respondents did not, however, expressly except to this portion of the Intermediate Report.

¹³⁶ Campbell admitted that the term N. R. A. did not appear after the names of the employees in the respondents' records, but claimed that his examination of the records led him to the conclusion as to whether an employee was an N. R. A.

had been employed by the respondents for a long time prior to the N. R. A., and had not been hired to meet its requirements. Nor is there any evidence in the record to show that employees other than the claimants who were engaged in what Campbell called "N. R. A. work" were not employed after the respondents resumed operations. It is admitted that the actual type of work done by "N. R. A. men" continued after July 5, and that "extras" were also hired thereafter. Further, the evidence shows that Campbell made out rustling cards for certain of the employees who were claimed to be "N. R. A." and "extra" men when preparations were begun to resume operations.¹³⁷ These cards were, of course, made out on the assumption that those for whom they were issued would work, and that, therefore, work would be available. Campbell testified that the fact that a rustling card was made out meant that a person was "fully entitled" to reemployment, and further that such cards were given, after the plants resumed operation, to every man who applied for them. Campbell stated that he "could not recall a single instance" in which a rustling card was refused until the end of 1935. From his own testimony, then, it affirmatively appears that jobs were available for at least some "N. R. A. men" and "extra."¹³⁸ Finally, it affirmatively appears that Albert Plummer and James Roper, although claimed by the respondents to have been "extras,"¹³⁹ were reinstated after they had obtained blue cards.¹⁴⁰

Under all the circumstances we do not believe that the respondents have shown that the jobs of these particular claimants have disappeared, but rather only that certain work was curtailed. A legitimate curtailment of work does not, however, necessarily justify exclusion of the claimants from consideration for the jobs remaining. The evidence shows that not actual job disappearance but membership in the International and failure to obtain a blue card were the real reasons for the failure to reinstate this group of men.¹⁴¹

¹³⁷ The evidence shows that rustling cards were issued for the following claimed "N. R. A. men" or "extras": John Bennett, J. C. Emerson, Luke Patrick, John E. Freeman, James C. Thompson, and Kenneth McNutt.

¹³⁸ The evidence further shows that the respondents maintained the group insurance of many claimed "N. R. A. men" until August 1935, long after the N. R. A. had been invalidated and their jobs had supposedly disappeared.

¹³⁹ It is not clear whether the respondents attempted to distinguish between "N. R. A. extras" and ordinary "extras." They apparently contend that either type is precluded from employment. Plummer and Roper were ordinary "extras."

¹⁴⁰ It is also clear that at the Galena plant, which was the chief plant claimed to be affected by "job disappearance," many new processes and operations were begun after resumption of work. When asked by Board's counsel to name such new processes, Joe Newby replied, "Whew! I can't do that."

¹⁴¹ Thus, for example, we have found above that in July 1935, Frudenberg told Brooks, one of the alleged "N. R. A. men," that Brooks had "stayed away from his job" too long and had "hung around those 'reds' at Picher." Similarly in November 1935 Newby asked Freeman, who was also an alleged "N. R. A. man," whether Freeman had picketed, and told Freeman that the latter would be given a rustling card if he first obtained a blue card.

Similar reasons are applicable to the respondents' contentions concerning the abolition of the jobs of other claimants. We are unable to find that the disposal of the Grace B, Tulsa-Quapaw, or other mines automatically precluded the claimants who worked at those mines from employment. While some mines were closed, other new ones were opened. The evidence abundantly shows that both before and after May 8, 1935, employees shifted from mine to mine. Raymond Burgett, one of the claimants whose job the respondents urge had disappeared with the sale of the Tulsa-Quapaw mine, had worked at that mine for only a month; he had previously worked at the respondent Mining Company's Tom Brown mine. Similarly, G. M. Headley had worked at the Bendelari and Tom Brown mines before working at Grace B; A. F. Bruce had worked at "10 or 12" different mines of the respondent during his 12-year employment; W. S. Fulkerson worked at the Lucky Jew and the Tom Brown before working at Grace B; Henry Bloom worked at the Tom Brown, the Southside, the Adams, and Picher mines 14, 22, and 30; Henry Freeman worked at the Bendelari, Tom Brown and Grace B; A. O. Plummer worked at the Tom Brown and Grace B. Further, the evidence affirmatively shows that persons other than the claimants who had worked at these mines on May 8, 1935, were given jobs at other mines after the resumption of work. Respondents Exhibit No. 43, containing affidavits of employees who had resigned from the International before the mines reopened, show that Bud Griffith, Ollie Harmon, James Mann, Joe Nave, Dan Shears, J. E. Stacy and William Smith all had worked at the Tulsa-Quapaw prior to the strike and were put to work at other of the respondent's mines in June and July. The affidavits of these men show that almost without exception they first joined the Tri-State Union. Similarly, on March 1, 1937, A. O. Plummer, a claimant who had worked at the Grace B on May 8, 1935, was reinstated after he obtained a blue card.

Concerning other "job disappearances," such as the abolition of the night shift at the Big John, the decrease in the number of machinemen, and the curtailment of operations of shaft 86 of the Big John mine,⁴² the evidence is similar. Rustling cards were made out for some claimants although the respondents claimed that their jobs had disappeared; those who were not members of the International or who took out blue cards were given work elsewhere than at the place of their employment on May 8, 1935; and claimants in this category who did apply were refused by supervisory employees who told the applicants they had been too active in the strike or had failed to obtain blue cards.

⁴² There is evidence that this shaft continued in operation, but it is unnecessary to make findings on this issue for reasons herein stated.

Finally as to certain miscellaneous decreases in employment, Campbell's testimony is revealing. He explained that, for example, when the Big John mine reopened, one less machineman was employed. When asked how he determined that the job thus abolished was the one of the particular claimant, Campbell replied:

In my opinion, the men who reapplied and took the job more or less determined that, and the man who didn't reapply determined whether he had quit or not.

Later, Campbell clarified this by explaining that if one job remained where two had been, whichever former employee applied first got the job, and the job of the remaining employee "disappeared." We have held in a prior case that where an employer by blacklisting four employees because of their union leadership led them reasonably to believe that they would not be permitted to return to work and thus caused them to postpone their applications until after the available jobs were filled, it was, under such circumstances, a violation of Section 8 (3) of the Act "to apply the 'first come, first served' principle" to these four men.¹⁴³ We find from Campbell's testimony that in effect the respondents were simply applying a "first come, first served" principle of determining that jobs of the particular claimants had "disappeared" and that the application of such a principle was itself discriminatory where illegal conditions were present as a condition to reemployment. Under all the circumstances, we find that the respondents have failed to show that the claimants coming within this category would in any event have been refused reemployment, absent illegal conditions.

(b) Claimants who filed lead poisoning or other compensation suits against the respondents

The respondents contend that certain employees who filed suits or claims against the respondents alleging permanent, total, or partial disability by reason of lead poisoning or other illness were not discriminatorily refused reinstatement but were automatically disqualified in the filing of such claim.¹⁴⁴ The Trial Examiner found that the respondents, by their failure and refusal to reinstate these men, did not discriminate against them. The International Union did not except to such finding. The evidence shows, and we find, that these suits were filed during the strike and alleged permanent disability since a date prior to May 8, 1935. The evidence further

¹⁴³ *Matter of Mackay Radio & Telegraph Company, a corporation, and American Radio Telegraphists' Association*, 1 N. L. R. B. 201, Board's order enforced, *National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U. S. 333 (1938).

¹⁴⁴ Persons who filed such claims are listed in footnote 7 above. To that list should be added the name of Elmer Belk.

shows, and we find, that it has been the respondents' practice before and after May 8, 1935, not to employ persons who filed such claims or brought such suits against the respondents. Although the testimony of the claimants who filed these claims indicates that at least in some instances such persons did not have the disabilities which they had alleged in their claims, and that these persons had been persuaded to sue by attorneys, we feel that we are bound by the respondents' rule. We find that as to the claimants in this category, the respondents have successfully established that, regardless of all other considerations, these claimants would have been refused reinstatement. We find, therefore, that the respondents, by refusing reinstatement to Elmer Belk, Leroy Berry, Orven Blinzler, Roy Bray, Clabe Brown, Lonian Brown, Elmer Dean, Orlay Dodd, Pleas Duncan, Oliver Hiatt, Walter Jewell, Jay O. Jones, Jess Kitch, Carl LaTurner, Clarence Loflin, William Mathiews, Clyde Schroeder, James Webb, and George White did not discriminate in regard to their hire and tenure. We will dismiss the complaint in so far as it alleges that these named individuals were refused reinstatement because of their International membership or their failure to obtain a blue card.

(c) Claimants who are alleged not to have been employees of the respondents on May 8, 1935

The respondents urge that certain claimants were not employed by them on May 8, 1935; were not employees of the respondents; and do not, therefore, fall within the issues as framed by the complaint.¹⁴³ In his Intermediate Report, the Trial Examiner found that certain of the claimants were not so employed and, therefore, were not discriminatorily refused reinstatement.¹⁴⁶ The International Union did not except to these findings in respect to these claimants other than L. B. Anderson and Earnest Bogle. The Trial Examiner did not find that Everett Hall or Elmer Mast fell within this disqualification, although the respondents urged that they did.

In regard to this group of claimants other than Anderson, Bogle, Hall, and Mast, the evidence is clear that they were not employed by the respondents during the pay-roll period ending May 8, 1935. *Manuel F. Jones* last worked for either of the respondents on April 3, 1935. *Charles Owens* was discharged for drunkenness on March

¹⁴³ These persons are L. B. Anderson, Leroy G. Berry, Earnest K. Bogle, Clabe Brown, Everett C. Hall, Manuel Jones, Elmer Mast, Charles Owens, Albert Rigg, Joe Reece, Tom Reece, Clyde Schroeder, and Elmer Tinkler. We have already excluded Berry, Brown, and Schroeder in the preceding section and shall not, therefore, consider the claims relating to them.

¹⁴⁶ The persons so found by the Trial Examiner are listed in footnote 8 above. He also included Winth Jervis, Clayton Johnson, and Orville Stever, whose names were withdrawn or who did not testify. We shall not consider the claims as to them since they are excluded in any event, as noted below.

21, 1935, and removed his property from his locker and received a refund on April 8, 1935. His name does not appear on any of the respondents' pay rolls for the week including May 8, 1935. Neither *Joe Reece* nor *Tom Reece* had been employed by the respondents since 1934. *Albert Rigg* was discharged on April 2, 1935, for injuring a mule and was not thereafter employed by the respondents. *Elmer Tinkler* was discharged by the respondents on April 10, 1935, and was not thereafter reemployed.¹⁴⁷

Neither *Anderson* nor *Bogle* was on the respondents' pay roll for the week during which the strike began. *Anderson* last worked for the respondents on April 26, 1935, at which time, he testified, he laid off because he was sick. *Bogle* laid off on or about April 27, 1935, in order to visit his relatives; his foreman had given him permission to do this. The International, in its brief and exceptions, contends that it was the respondents' custom to grant temporary leaves and that the employee did not thereby lose his status. Although there is some evidence that employees were occasionally permitted to lay off a day or two and thereafter resumed the same work, we are unable to find that it was the respondents' custom and policy to permit lay-offs for 2 or 3 weeks. We find, therefore, that *Anderson* was not an employee of the respondents at the time of the strike or thereafter. As to *Bogle*, however, we find that he retained his employee status because of the express permission of his foreman for his lay-off.

The respondents also claim that *Hall* and *Mast* were not employed by them at the time of the strike. The Trial Examiner did not find that these men were not employees, and the respondents did not expressly except to his failure to do so. *Hall* was an extra employee who had last worked at the Galena smelter on May 3, 1935. He was not on any of the respondents' pay rolls for the week including May 8, 1935. We find, therefore, that *Everett Hall* was not an employee of the respondents at the time of the strike or thereafter.

During the hearing, the respondents contended that *Mast* had been discharged for cause in April 1935 and was not therefore employed by the respondents. By way of rebuttal, witnesses for the Board testified that *Mast* had been discharged in April but that, after missing only one shift, he returned to work and worked up to the time of the strike. From the testimony of *Mast* and other witnesses, it appears that *Mast* had been discharged following the stealing of certain gasoline, that the respondent Mining Company had thereafter investigated the incident on *Mast's* appeal, that such investigation disclosed *Mast* was not the guilty party, and that the

¹⁴⁷ There is evidence that he was discharged immediately after the respondents discovered he was chairman of an International Union committee. This was prior to the effective date of the Act, however, and *Tinkler*, therefore, was not an employee at the time the labor dispute began.

respondents' officials apologized and immediately restored him to his job. Mast's name appears on the Galena pay roll for the week including May 8, 1935, and ultimately the respondents' counsel conceded that Mast was put back to work. We find, therefore, that Elmer Mast was employed by the respondent Mining Company on May 8, 1935.

We find that Manuel Jones, Charles Owens, Joe Reece, Tom Reece, Albert Rigg, Elmer Tinkler, L. B. Anderson, and Everett Hall were not employees of the respondents on May 8, 1935. The complaint does not raise any issue of discrimination against persons other than those whose names were on the pay roll for the week including May 8, 1935. We will dismiss the allegations of the complaint in respect to these claimants.¹⁴⁹

(d) Strikers alleged to have been guilty of misconduct in the course of the strike

The respondents urge that the misconduct of certain named claimants during the course of the strike precludes the Board either from finding discrimination against such persons or from ordering their reinstatement.¹⁴⁹ These claimants fall into three general groups: (a) those convicted by a Kansas military court of participation in the Galena riot and/or perjury;¹⁵⁰ (b) those against whom charges of murder arising out of the pick-handle parade of April 11, 1937, were pending at the time of the hearing;¹⁵¹ (c) Leroy Berry, who was indicted for an assault with intent to kill and whom we have already excluded on other grounds; and (d) M. J. Vanderpool,¹⁵² who was convicted and sentenced to 4 months in jail for the assault on May 27, 1935, on Sheriff Ely Dry. In his Intermediate Report the

¹⁴⁹ The case of *Luke A. Patrick* is disposed of on similar grounds. Patrick went on strike on May 8, 1935, having worked for the respondents for 3 weeks prior to that time, earning a total of \$47.99. On June 1, 1935, Patrick became a regular section laborer with the "Frisco" railroad in the Tri State area. He was still employed there in 1938, having earned a total of \$2,159. We find that on June 1, 1935, Patrick obtained regular and substantially equivalent employment. On July 5, 1935, therefore, when the Act became effective, he was not an employee of the respondents. We will dismiss the allegations of the complaint as to him.

¹⁵⁰ It is not entirely clear whether the respondents' contention is directed against a finding of discrimination or simply against the Board's exercising its discretion in issuing a remedial order on behalf of such claimants. For purposes of convenience only, we shall assume the former and discuss the issue here rather than in the section below entitled "The Remedy."

¹⁵¹ Such persons are John Bankhead, Clabe Brown, Elmer Dean, James Hensley, Darrell Largent, Carl LaTurner, Walter Overstreet, Wesley Qualle, Ted Schasteen, W. F. Sowder, William Webb and Raymond Williams. For other reasons, we have already excluded Clabe Brown, Elmer Dean and Carl LaTurner.

¹⁵² These claimants are Jess Kitch, whom we have already excluded on other grounds, Darrell Largent and William Webb. The charges were subsequently dismissed, as noted below.

¹⁵³ The Trial Examiner did not find that Vanderpool was disqualified from reinstatement, and the respondents did not expressly except to his failure so to find.

Trial Examiner found as to certain of these persons that, because of such misconduct, the respondents had not discriminated against them. The International excepted to these findings.¹⁵³

These claimants were not, of course, discharged or notified that they would be refused reinstatement following the alleged misconduct.¹⁵⁴ As described at length above, the strike was marked by considerable violence by the Tri-State Union. We have found that the respondents were both directly and indirectly connected with such violence. The respondents either paid for or supplied the pickhandles; through their supervisory officers, they encouraged and participated in the violence. Further, as stated above, they employed as guards at the Galena smelter Luther Sons, a person with a criminal reputation in the community, and Charles Butler, who had been convicted for robbery in the first degree.¹⁵⁵ The record is devoid of any indication that the respondents discharged or refused employment to Tri-State Union members who were also guilty of violence, nor did they in any way discipline their supervisory employees who participated in such violence. Further, there is strong indication that the respondents and the Tri-State Union induced and procured local law officers in the Tri-State area to withhold arrest and prosecution of non-International members while at the same time International members were dealt with summarily and without proper hearing. Finally, other parties did not themselves treat the misconduct with great seriousness. The military court which convicted certain International members imposed a maximum sentence of 60 days. A great majority of the sentences were for far shorter periods, and many of the convicted persons were not required to serve their terms at all. The murder charges¹⁵⁶ were dismissed on February 28, 1939, by the Justice of the Peace for Cherokee County, Kansas, upon motion by the Special Prosecutors in the cause. The motion to dismiss was based on "insufficient evidence."¹⁵⁷ The respondents themselves did

¹⁵³ In its exceptions and brief the International collaterally attacked the validity of the military convictions, contending that such trials and convictions were in violation of the Kansas State constitution. In view of our findings and conclusions concerning these persons, it is unnecessary for us to pass upon this contention.

¹⁵⁴ The insurance certificates of four of the men named as having been convicted in July 1935 for participation in the Galena riot were not cancelled until the respondents so notified the insurance company by letter dated August 9, 1935. In this letter, 98 policies were cancelled by the respondents, with the explanation that since the men "have not to this time re-applied for work, they must have definitely 'quit.'"

¹⁵⁵ Butler had been convicted of this crime while employed by the respondents, who continued to employ him thereafter. As described above, the Tri-State Union had in its employ one Sylvester Walters, a notorious criminal. In September 1935, the Tri-State Union paid Walters \$738. The Union's bookkeeper testified, and we find, that this sum came out of the "subscription fund" supplied by the respondents.

¹⁵⁶ For aught that appears in the record, the charges were no more than an information signed by an individual.

¹⁵⁷ We take judicial notice of the records of the Justice of the Peace in this matter. See *Matter of Republic Steel Corporation and Steel Workers Organizing Committee*, 9 N. L. R. B. 219, 389.

not except to the Trial Examiner's failure to find that Vanderpool was precluded from reinstatement.

We have said that we cannot condone violence by any party to a labor dispute, but that "an employer cannot, however, use the fact that violence has been committed during a strike as a pretext for not reinstating some of his employees where the real motive behind his refusal is the union activities of such employees."¹²⁸

From the facts as presented above, and in the light of the respondents' conduct from the record as a whole, it is clear, and we find, that the real reason behind their contention that these men's misconduct disqualified them is the union membership and activity of these employees and their failure to obtain a blue card, and not any act of violence alleged to have been committed by them.¹²⁹

(e) Persons claimed to have expressed an unwillingness to return to work

In their factual brief based on testimony adduced at the hearing, the respondents named several claimants as having refused to return to work, or as having stated at the hearing that they had been and were unwilling to return unless the International's demands were granted. The Trial Examiner found that John Basnett and Milloy Ferguson fall within this category and so had not been discriminated against. The respondents did not except to his failure to find that others fell within this group. The International excepted to the finding in relation to Basnett and Ferguson.

The respondents, through their supervisory employees, offered certain of the strikers jobs in June, July, and thereafter. Many of such offers were accompanied by the express announcement that a blue card was necessary. In other cases, no such announcement was made. The strikers nevertheless refused to return to work. In view, however, of the widespread publicity concerning the requirement of a blue card, and the universal understanding that such was necessary, we presume that the offer contained the implied condition. Further, in the absence of specific statements to the contrary by the striking employees, we presume that the employee's refusal was based on his understanding that the offer was conditional on his

¹²⁸ *Matter of Kentucky Firebrick Company and United Brick and Clay Workers of America, Local Union No. 510*, 3 N. L. R. B. 455, enforced in *National Labor Relations Board v. Kentucky Firebrick Company*, 99 F. (2d) 89 (C. C. A. 6th, 1938); *Matter of Stackpole Carbon Company and United Electrical & Radio Workers of America, Local 302*, 6 N. L. R. B. 171, enforced in *National Labor Relations Board v. Stackpole Carbon Company*, 105 F. (2d) 167 (C. C. A. 3rd, 1929).

¹²⁹ The letter quoted in footnote 124 above indicates that in August 1935 the respondents themselves did not consider these employees discharged because of conviction for participation in the Galena riot.

obtaining a blue card. A discriminatory offer is immaterial. In a prior case we have said:

The evidence shows that certain of the employees were requested by the respondent to return to work after the lock-out. These requests took various forms, including letters, telegrams, telephone calls, and personal visits by foremen and executives . . . They contain a simple request to return, with no conditions expressly attached. It is the position of the respondent that these communications contain its official position and cannot be considered as having any conditions attached to them. This position cannot be sustained.

After discussing the general understanding that conditions did actually attach, the Board stated:

The inference which it is natural to draw from the . . . telegrams and letters was that those who received them were being given an opportunity to return to conditions which were well understood . . . Willingness to reinstate employees only on the conditions above described, conditions which the respondent had no right to attach, is equivalent to absolute refusal to reinstate. With respect to violations of the Act and the remedy therefor, all of the employees in question, whether or not they received a conditional offer of reinstatement, stand on the same footing.¹⁰⁰

Certain employees, however, made statements which require special consideration. *Earl Tennis* was asked to return to work by Newby in June, but refused, saying that he wished to complete the repairing of a house on which he was then working. Tennis did not claim that he made this statement because of his understanding that a blue card was necessary, and in view of his clear rejection of Newby's offer, we cannot find that he would have returned to work under any circumstances. However, in the spring of 1937 Tennis went to Newby's office and asked for a job. Newby asked Tennis whether he was "in on any of their riots, or anything that had taken place." Newby told Tennis to return a few days later for the answer. When Tennis did return, Newby said, "I can't give you a card." On March 3, 1937, shortly before this incident, Tennis' application to the Tri-State Union for a blue card had been rejected. We find that on or about April 1, 1937, Tennis was willing to return to work, applied, but was rejected for discriminatory reasons.

¹⁰⁰ *Matter of National Motor Bearing Company and International Union, United Automobile Workers of America, Local No. 75*, 5 N. L. R. B. 409, 435, order enforced in *National Labor Relations Board v. National Motor Bearing Company*, 105 F. (2d) 652 (C. C. A. 9th, 1939). The offer of reinstatement, to be considered bona fide by the Board, must be unequivocal. *Matter of Kachue Manufacturing Company and Local 1791, United Brotherhood of Carpenters and Joiners of America*, 7 N. L. R. B. 304. See also *National Labor Relations Board v. American Manufacturing Company*, 309 U. S. 629.

At the hearing *W. B. Yingst* stated that he was and had been unwilling to return to work if he had to join the Blue Card Union and give up his International membership. Such a statement does not disqualify him. *John Basnett* testified at the hearing that his position had been and still was that he would not return to work unless the International was recognized as exclusive bargaining agent. *Millow Ferguson* admitted at the hearing that in June 1935 he told a foreman he would not return to work until the strike was settled. Viewed in the light of all circumstances, however, we do not believe that Basnett and Ferguson intended these statements literally. Both of them had applied for work, Basnett early in 1936,¹⁶¹ and Ferguson in July 1935. Basnett also applied for a blue card in order to obtain work, but his application was rejected. We find, therefore, that Basnett and Ferguson were not unwilling to return to work even if the conditions they testified to were not fulfilled, and that their statements do not disqualify them.¹⁶²

As we have described above, at the several conferences with Potter after July 5, 1935, representatives of the International sought settlement of the strike and a return to work. Further, a substantial number of claimants individually sought reemployment. On the basis of all the testimony, as well as these specific indications, we find that, except as found above, the claimants were at all times after July 5, 1935, willing to return to work in the absence of illegal conditions.¹⁶³

- (f) Persons claimed to have been incapable, because of ill health, of working at all or some times after May 8, 1935

The respondents claim that certain claimants have been in ill health and incapable of working at all or some times since May 8, 1935. At the outset, it should be noted that the respondents' counsel stated at

¹⁶¹ Prior to this, DeMier had requested Basnett to return to work and told Basnett a blue card was necessary. Basnett refused expressly on the ground of the necessity of a blue card.

¹⁶² See *National Motor Bearings Company and International Union, United Automobile Workers of America*, Local 412, 5 N. L. R. B. 409, where the Board stated: "Many of the employees testified that they would not return to work unless the respondent recognized and bargained with the U. A. W. This appears to be the position adopted by the U. A. W. . . . In view of the respondent's announced position with regard to the return of its employees to work, it is not necessary to consider the effect of this attitude on the part of the men." See also *Matter of Lindeman Power and Equipment Company and International Association of Machinists*, 11 N. L. R. B. 868, where the Board said, "Although Campbell and Kroun testified at the hearing that they would not return to the respondent's employ as long as the Union's strike against respondent continued, we do not consider this conclusive. . . . Such testimony cannot be regarded as an unequivocal assertion that the men would not have returned had such an offer been made. Rather, it was the type of statement which any union member . . . would make if publicly questioned concerning his probable course of action with respect to working during the pendency of a strike. . . ."

¹⁶³ "Nor is it an answer to say that they were striking and would not have applied in any event." *Matter of Carlisle Lumber Company*, cited above.

the hearing, in connection with these claims of disability, that "My point is that our indication of some disability does not mean that the man has come up and been refused on account of that disability or necessarily that he would be refused upon application on account of that disability." It is in the light of this statement that we turn to a consideration of these claims.

W. H. Allen testified, and we find, that he became ill on June 1, 1937, was operated upon July 6, 1937, and did not recover completely until March 1938. At all other times, he was in good health and capable of working for the respondents.

Otto Anderson testified, and we find, that he suffered from lead poisoning on and after May 1935 and has at all times been incapable of working for the respondents.

Joe Ballard testified, and we find, that he was blind in one eye. His eyesight was thus impaired while working for the respondents and it had not grown any worse at the time of the hearing. We find that Ballard has not been in such ill health as to justify the respondents' claim that he was at any time unemployable.

Theodore Bennett was blind in his left eye and had always been so while working for the respondents. We find that Bennett has not been in such ill health as to justify the respondents' claim that he was at any time unemployable.

Campbell testified that the respondents' records show that *E. E. Browning* had an "anomalous back condition" and that this had been shown in Browning's last physical examination. Browning was permitted to work after the examination.¹⁶⁴ Campbell explained that an "anomalous back condition" meant that a person had six lumbar vertebrae instead of five. He admitted that many with such a condition were fully capable of doing their work. We find that Browning has not been in such ill health as to justify the respondents' claim that he was at any time unemployable.

William Cagle was 72 years old at the time of the hearing. No other disability is assigned and the respondents, before and after the strike, employed persons who were over 60 years old. We find that Cagle is in good health and has at all times been employable.

¹⁶⁴ George and Campbell both testified that new and more rigid physical requirements had been put in effect before May 8, 1935, but that nevertheless, men then employed who did not fulfill these requirements were kept on. If such employees, however, quit their jobs, they were required to meet the higher standards on their return. Campbell testified that he considered the strike as such a voluntary absence. The weight of this testimony disappears, however, before Campbell's admission that it was not until 1936 that those employees who applied at the mills and mines to resume work were subjected to physical examinations at all, and that until 1936, no rustling cards whatsoever were refused regardless of physical examinations. It thus appears that had there been no blue card requirements so that these employees could apply on resumption of operations in June 1935, they would have been subjected to no physical examination and their "disability" would have been no bar. In any event, we hold that to allow the respondents to penalize striking employees would be contrary to the purposes of the Act.

Claude Dalton applied for work after having obtained a blue card, in August 1935. He was given a physical examination which George testified Dalton failed. The respondents did not specify the nature of the alleged disability nor did they produce the record of the results of the physical examination, and on rebuttal Dalton denied that he had been or was in ill health. We conclude that the respondents have failed to establish that Dalton was or is disabled, and we find that he is and at all times has been employable.

Edward Doty was 66 years old at the time of the hearing. No other disability is assigned by the respondents. For reasons similar to those discussed in connection with Cagle above we find that Doty is and at all times has been employable.

Fred Foster sustained a broken arm on or about December 15, 1937, and was unable to do any work for approximately 8 weeks thereafter. At all other times he was in good health and capable of working for the respondents.

Mack Hanks was claimed by the respondents to be "unemployable on account of physical condition." There is no evidence in the record of any illness or disability suffered by Hanks and we find that he was in good health and employable on and after May 8, 1935.

Curtis Harbaugh obtained a blue card and applied to Leonard Vaughn for reinstatement in September 1936 and was given a physical examination. George testified that Harbaugh failed to pass. The examination records were not produced, and Harbaugh denied that he had failed to pass. We conclude that the respondents have failed to establish that Harbaugh was or is disabled, and we find that he is and at all times has been employable.

The respondents claim that *G. Marion Headley* is unemployable because he made "10 or 11 reports" concerning a back injury. Campbell admitted that such reports were made before the strike. They did not militate against Headley's continued employment until the strike. We find, therefore, that Headley's health has not been such as to preclude his employment by the respondents.

W. E. Honeywell died on February 16, 1938, during the hearing. He had been suffering from a cancer and his physician testified, and we find, that Honeywell was in ill health and incapable of employment after December 1, 1936.

Recie F. Jones had a deformity of the right shoulder which he had had since early youth. The deformity was existent while he was employed by the respondents, and it had not grown worse since May 8, 1935. At the time of the hearing he was employed as a blacksmith for the W. P. A. We find that Jones' disability was not such as to render him unfit for the type of work at which he was engaged on May 8, 1935.

Orley Martin suffered from heart and stomach trouble and went to the hospital on August 10, 1936. He was not in good health at the time of the hearing. We find that Martin was disabled and incapable of employment by the respondents at all times after August 10, 1936.

Chauncey Mitchell was 65 years old. In his testimony Vaughn described Mitchell as "a cripple with a bad leg." There is no evidence that this disability did not exist while Mitchell was employed by the respondents in 1935, nor, as stated above, can we find that his age disqualified him. We find that Mitchell's physical condition is not such as to preclude him from employment by the respondents.

James M. Roper worked for another operator in the Tri-State area after the strike and until August 19, 1935, after he obtained a blue card. Thereafter he developed a brain tumor which was progressive. We find that at all times during which Roper would have been entitled to back pay he was in ill health and incapable of employment and that he is not now capable of employment.

Fay Stone was injured on August 8, 1937, while working in Arizona. He smashed one rim of his pelvis bone, was still walking with a limp at the time of the hearing, and, when asked whether he could do the work formerly done for the respondents, testified "Well, I could do some I done here, yes." He sued his Arizona employer for compensation for a "partial, permanent disability." We find that Stone was in ill health and incapable of employment at all times after August 8, 1937.

James C. Thompson suffered an eye injury on or about July 8, 1936. Since that injury he has been blind in one eye. He testified that the vision in this eye was impaired to some extent while working for the respondents before May 8, 1935. However, unlike the persons discussed above who were blind in one eye, Thompson's disability had become worse after his employment by the respondents, and further, in view of his testimony that after his injury, he was laid off by two other mining operators because of his eye condition, there is evidence that his disability affected his work. We find that at all times after July 8, 1936, Thompson was incapable of doing the work at which he had formerly been engaged by the respondents.

William Van Treece testified that before May 8, 1935, he was struck in the eye by a rock while working for the respondents and that since then his eyesight and hearing have been defective. Since it does not appear when Van Treece's injury originally occurred, or that he had been employed by the respondents for any substantial length of time while suffering from his disability, and since it is further inferable from Van Treece's testimony that his condition has grown worse since May 8, 1935, we find that Van Treece is and has

been at all times after May 8, 1935, incapable of working for the respondents.

The respondents' medical chart, based on physical examinations prior to May 8, 1935, reveals a positive serology for *Charles Ward*. Campbell could not recall when Ward's examination took place, but he admitted that although the condition was discovered before the strike, Ward was nevertheless continuously employed by the respondents until May 8, 1935. Under these circumstances, the respondents cannot claim that Ward's disability was such as to render him unemployable, and we find that it was not such.

Byron Warmack, according to Campbell, has "open inguinal rings, which are equivalent to potential hernia." Campbell admitted that this condition was disclosed by an examination sometime prior to May 8, 1935, and that Warmack was nevertheless retained in the respondents' employ. In rebuttal, Warmack testified, and we find, that he has had no abdominal difficulties since May 8, 1935, although since that date his employment elsewhere has at least in part involved the lifting of planks. We find that Warmack's health has not at any time since May 8, 1935, been such as to render him incapable of working for the respondents.

P. L. White was 66 years old at the time of the hearing. Campbell testified that White had in 1932 been listed as a poor physical risk, since he obtained only a D rating, the lowest a person can receive and obtain employment. Not only was White employed until May 8, 1935, but a rustling card, entitling him to employment, was made out for him when the respondents resumed operations in June 1935. There is no evidence, and we cannot presume, that mere passage of time has disabled White. We find that White has at all times after May 8, 1935, been capable of employment by the respondents.

J. E. Wilson testified that sometime before the strike, he suffered from lead poisoning, that he was laid off for a month as a result, and that thereafter he resumed work for the respondents until May 8, 1935. There is no evidence that Wilson was disabled after his lay-off, and the fact that he was reemployed by the respondents until the strike is plain indication to the contrary. We find that Wilson was capable of employment at all times after May 8, 1935.

Elmer Wood went to a hospital for an operation on August 9, 1937. The record does not show when or if he recovered. Campbell testified that Wood's physical examination, made at sometime before May 8, 1935, showed Wood to have high blood pressure and a D rating. He was nevertheless employed after the examination and until the strike. We find that Wood was at all times capable of employment by the respondents up to August 9, 1937.

Floyd Woolever went to a tuberculosis hospital on or about May 25, 1935, suffering from lung hemorrhages. We find that at all times

after May 25, 1935, Woolever was incapable of employment by the respondents.

Cecil Yocum obtained a blue card and applied for work in August 1936. He was given a physician examination. George testified that Yocum failed the examination because of a back injury. In the absence of any denial by Yocum, we accept George's testimony and find that Yocum was incapable of employment by the respondents on and after an unspecified date before August 1936.

We find that except as stated above, and except as to those claimants whom we have excluded on other grounds and concerning whose health we have therefore made no findings, all claimants have on and after July 5, 1935, been in good health and capable of employment.

(g) Persons concerning whom the respondents made claims of incompetence

The respondents claim that the employment records of Roy Mayfield, W. S. Fulkerson, and Ed Blackburn were such that they would in any event have been refused employment.

In respect to *Roy Mayfield*, the respondents urge that he was given to playing practical jokes on his fellow employees and dropping rocks on an employee named Charles Halsey. Frudenberg testified that 5 or 6 months after the strike began Halsey informed Frudenberg that Mayfield had, prior to the strike, dropped rocks on him, had hidden tools and had "in other ways made it very disagreeable" for the other employees. Frudenberg further testified that when Mayfield subsequently asked him for a recommendation, Mayfield admitted these activities and that Mayfield said that "he and others were going to run things the way they wanted, and that they had the world by the tail." Frudenberg testified that he then told Mayfield that "I never wanted him to work any place that I had any jurisdiction."

Mayfield, who had actively picketed during the strike, denied that he had engaged in the activities claimed by Campbell. He testified that he had been employed by the respondents for 7 years prior to the strike, that he had asked Frudenberg for a job in July 1935 but had been told that a blue card was necessary, and that he had applied to Campbell for a rustling card but Campbell referred him to Frudenberg, who refused to assist Mayfield. Mayfield also denied that Frudenberg had made any mention of these alleged incidents, or that the matter came up in the conversation at all.

A considerable degree of improbability casts immediate doubt on the respondents' claim concerning Mayfield's alleged misconduct. Such improbability derives from the time of Frudenberg's purported

discovery of the matter. Frudenberg claimed that Halsey did not call the matter to his attention until 6 months after the resumption of operations and, therefore, 6 months after Mayfield had worked for the respondents or could have engaged in such misconduct. There is no apparent reason why Halsey, supposedly a frequent target of rocks dropped from a 25-foot height, should have chosen to report the matter 6 months after Mayfield had stopped working for the respondents, and at a time when, to all intents and purposes, Mayfield was permanently divorced from the respondents. We are unable to find that there could have been any stimulus or provocation for Halsey to become concerned over the matter, if it were not fictitious, at so late a date. Further, since Frudenberg admitted that there was a foreman over Mayfield's department, it is difficult to believe that Mayfield could have behaved as alleged for several weeks before the strike without either the foreman or Halsey making some prompt report. Finally, the conflict is between Mayfield's specific denial on the one hand and Frudenberg's general claim of an alleged report and of hearsay evidence concerning an alleged happening. Halsey himself, the purported target and complainant, was not called by the respondents.

Under these circumstances, and in the light of the respondents' conduct as a whole, we do not believe that Mayfield was refused re-employment because of his alleged misconduct. We find that Mayfield was refused reinstatement because of his membership in and activities on behalf of the International, and because of his failure promptly to obtain a blue card.

W. S. Fulkerson went out on strike on May 8, 1935, but did not join the International until on or about May 10, 1935. He had been employed by the respondents for 10 or 11 years before the strike. Fulkerson testified that in October 1935, he went to his ground boss in an effort to obtain employment, that his ground boss referred him to Campbell, and that Campbell told him that a blue card was necessary. Thereafter, Fulkerson applied for a blue card several times but was rejected. About October 1936, Fulkerson finally was admitted to membership in the Tri-State Union, and he immediately applied to Campbell for work. Campbell, according to Fulkerson, told Fulkerson that there was "evidence in the record" that Fulkerson "was active in the strike and that he wouldn't issue me a rustling card; said he never would issue one."

Campbell testified that Fulkerson's compensation record was "unsatisfactory" in that he had reported five injuries, and that "this man had had a compensation claim which I had handled, and we didn't get along very satisfactorily on it. I didn't like his attitude." Campbell testified that it was for this reason that he had refused Fulkerson a rustling card in October 1936.

Campbell admitted, however, that the compensation matter occurred before the strike, and that he nevertheless issued a rustling card, albeit "very reluctantly," to Fulkerson after the alleged difficulties. Fulkerson continued to be employed by the respondents until the time of the strike. It thus appears that Campbell did not consider Fulkerson's attitude concerning the compensation matter serious enough to bar him from employment until after Fulkerson had joined the International and gone out on strike. We find, therefore, that the respondents refused to reinstate Fulkerson for the reason that he was a member and active on behalf of the International and that he had failed promptly to join the Tri-State Union.

Somewhat different considerations impel us to a contrary conclusion in the case of *Ed Blackburn*. Blackburn testified that in February 1936, he applied to Campbell for reemployment but that Campbell refused, calling Blackburn a "radical and a quitter." He further testified that, before refusing him, Campbell first consulted a book. Cross-examination elicited the fact that the book was "similar" to one produced thereupon by the respondents. This book contained only Blackburn's employment record, which showed Blackburn had left his employment with the respondents a great many times at short intervals and began work at other mines. Next to his name in the book is a notation, dated November 1, 1934, written by Campbell, stating "do not renew—moves around." The notation referred to renewal of a rustling card. Campbell testified that in February 1936, he refused Blackburn a rustling card because Blackburn was an "unsteady worker" and "moved around too much."

Thus the record shows that sometime before the strike Campbell had determined to refuse Blackburn a rustling card, and that at the first opportunity, Campbell did so refuse. Under such circumstances, where the cause was noted before the strike and was operative throughout, we find that Blackburn was refused reemployment for the reason that he was an unsteady employee and not because of International membership or activities.

F. The discharges

The discharges of Joseph Mallatt, Timothy Rayon, and Floyd Turbett¹⁹⁵

On the resumption of operations on July 17, 1935, *Joseph Mallatt* was reemployed by the respondent Mining Company at the Galena Smelter. A few days later, John Ross, a superintendent, told Mallatt that the latter was required to obtain a blue card. Mallatt thereupon

¹⁹⁵ Orlay Dodd also claimed that he was discriminatorily discharged after the strike. Since we have excluded him on other grounds, we do not pass upon this claim.

joined the Tri-State Union, turning his International membership card in as was required by the former organization. On September 15, 1935, he was discharged. On direct examination, Mallatt testified that after his discharge he went to Joe Newby to find out why he had been discharged and Newby said, "I understand you . . . was on as a spy down there [at the smelter] for the International." On cross-examination, when confronted with a questionnaire he had filled out before the hearing in which he attributed this remark to Ray Hallows, Mallatt testified that Hallows also accused him of being a spy. Mallatt at the hearing denied that he had been an International spy and stated that he had not been a member of the International Union after July 1935.

Newby denied that he had accused Mallatt of being a spy. He testified that he had discharged Mallatt on advice of Campbell since Mallatt had been stirring up lead poisoning litigation in the smelter and also because Mallatt had laid off for a week without notifying his foreman. Campbell corroborated Newby's testimony, testifying that he had notified Newby to discharge Mallatt because Mallatt had been "agitating" in regard to lead and silicosis suits.

On rebuttal, Mallatt was recalled and denied that he had ever discussed lead poisoning suits or other litigation with his fellow employees. He admitted that he did not report to work for several days, and testified that he had laid off in order to attend a funeral and to dig a neighbor's grave. On rebuttal, he further testified that he had spoken to Newby at a Tri-State Union meeting, where Newby told Mallatt that a complaint had been turned in against the latter since he "was on the battle line down there the 28th of June, in front of the smelter." Mallatt testified that he denied this, but that Newby told him that "I can't put you back to work until that fellow releases that charge against you." In the course of this rebuttal Mallatt denied that he had ever testified that Newby called him a spy, and admitted that Newby had not so accused him.

Thus it appears that Mallatt was not a consistent witness.¹⁶⁶ Nor does it appear likely that the respondent Mining Company should have discharged Mallatt for his International membership after he had resigned and joined the Tri-State Union. There is no evidence that Mallatt was in any way active in the strike or thereafter, or that he was engaged in subsequent union activities which might impel the respondent Mining Company to discharge him. We find, therefore, that the respondent Mining Company, by discharging Mallatt, did not discourage membership in a labor organization by discrimination in regard to hire and tenure of employment.

¹⁶⁶ On one point in his testimony concerning a conversation with Board's counsel, the latter was compelled to make a statement denying Mallatt's accuracy.

*Timothy Rayon*¹⁰⁷ had been employed for 6 years prior to the strike at the Joplin smelter. He was a member of the International and participated in the strike. He testified that early in September, he applied to Walter George for reemployment and that George told him "to take the [physical] examination, and I would have to join the blue card union." Rayon passed the examination, and George, according to Rayon, then directed him to go to Kelsey Norman's office to get a "temporary permit to come back to work." Rayon did so, and on September 9, 1935, returned to work. He had worked for only 7 shifts when George summoned him to his office and told him that "he would have to let me off, that I was turned down at the blue card union, and Mr. Vaughn said I could not work any longer without a blue card."

Vaughn testified that he recalled no one named Rayon and denied that he had told George that Rayon or anyone else had to be discharged because of his rejection by the Tri-State Union. George testified that in his conversations with Rayon he did not mention the Tri-State Union. He further denied that Rayon was discharged at all.

We cannot, however, accept the inference sought to be raised by the respondents that Rayon quit voluntarily. It is unlikely that an employee who had been working for the respondents for 6 years prior to the strike would, subsequent to reinstatement, suddenly find the work not to his liking after only seven shifts. Rayon's subsequent earnings show that he received nothing but occasional relief until 1937, so that we cannot infer that he left for a better job. In the light of George's unsatisfactory denial, in the light of the fact that Rayon was discharged coincidentally in time with renewed efforts to coerce employees at the Joplin plant into the Tri-State Union as described above, and in the light of the respondents' entire course of conduct with respect to requiring membership in the Tri-State Union, we find that Rayon was discharged because of his failure to become a member of the Tri-State Union.

Floyd Turbett had been employed by the respondent Lead Company at the Joplin plant since 1929. Prior to the strike he was an assistant superintendent but his work, in turn, was subject to more or less constant supervision. After the resumption of operations, he became foreman of the afternoon shift of the insulation department. During this shift he was in complete charge of supervising the work and the employees under him. On September 9, 1935, Turbett, who had not yet joined the Tri-State Union, was discharged by the respondent Lead Company.

¹⁰⁷ Rayon's name appears in the complaint as Jim Rayon. A motion to correct this was granted without objection.

The respondents contend, and the Trial Examiner found, that Turbett was discharged for neglect of duties. We agree, and since the International Union did not except to this finding, it is not necessary to discuss the evidence. We find that Floyd Turbett was discharged for cause and not on account of his failure to join the Tri-State Union.

The discharge of John R. Sheppard

During the hearing, on a supplemental charge duly filed, the complaint was amended to allege that on or about November 15, 1935, the respondent Lead Company discharged John R. Sheppard for the reason that Sheppard "had expressed dissatisfaction with instructions he had received from the said respondent requiring him to coerce subordinate employees upon his staff into joining the said Blue Card Union and had openly expressed his lack of sympathy for the coercive policy of said respondent with respect to said Blue Card Union."

We have already found above that on and after August 23 and until September 26, 1935, Sheppard had fought vigorously against the attempts of the Tri-State Union and of the respondents, through Potter, Vaughn, and MacGregor, to coerce the laboratory employees under Sheppard to join the Tri-State Union. Sheppard had questioned the authority of Potter and Vaughn in this matter; had protested against the respondents' attitude; had sent a petition to MacGregor, signed by the laboratory employees, opposing application to the Tri-State Union; had so opposed the respondents' policy in the matter that MacGregor came to Joplin from Cincinnati; had had vehement arguments with both Vaughn and Potter over the plan to coerce his laboratory employees; and had been reprimanded by MacGregor for keeping written records of the entire incident. These facts having been found on the basis of virtually undisputed evidence, the sole question remaining is whether or not Sheppard was discharged because of these incidents. The respondents urge that Sheppard was discharged for inefficiency, for failure to keep discipline among the employees of his staff, for his unsatisfactory conduct of the research department, for his dictatorial and intemperate attitude toward his subordinates, and for his overly technical supervision of laboratory reports.

Sheppard, a university graduate in chemistry, began to work for the respondent Lead Company in the research department at Joplin in 1926. In 1927, he became acting director of research, and thereafter, at times, director of research. On or about August 1, 1935, Dr. Shaeffer, the director of research, resigned to assume the presidency of Franklin and Marshall College, and Sheppard assumed

Shaeffer's duties. In 1926, Sheppard's monthly salary was \$350; in 1927, \$400; in 1928, \$483.83; and by 1931, his salary reached \$591.66 per month. Between 1931 and 1933, his salary was reduced at various times, finally reaching \$450 per month, where it remained until Sheppard was discharged. The respondents do not assign as the reason for these reductions any fault of Sheppard. Rather, the salary decreases were due to economic factors brought on by the depression. During this period, the Lead Company reprinted and distributed several of Sheppard's papers which had been prepared for the respondent Lead Company or which Sheppard had read to chemistry organizations. On or about November 15, 1935, Sheppard was called to the Cincinnati office of the respondent Lead Company and was notified of his dismissal, effective as of December 1, 1935.

The function of the research department is to investigate and develop new products from lead, zinc, and their byproducts, and to investigate and develop new methods of manufacturing such products and byproducts. The duty of the research director is to plan and work out investigations suggested by other departments of the Lead and Mining Companies, and also to initiate research of value to the Companies, to start and guide the research chemists in their experiments, to analyze with them the results and possible conclusions, and to supervise the drafting of reports for submission to the home office of the Lead Company.

The respondents adduced their evidence concerning Sheppard's discharge through two witnesses, E. W. McMullen, who replaced Sheppard, and Harold Harner, head of the storage-battery laboratory during the period in question, and, after Sheppard left, assistant research director. We here summarize the testimony of these two witnesses.

McMullen testified that "in the fall of 1935," or "about October 1935," he was retained by the Lead Company as a "consulting chemical engineer." He received his appointment from Potts, the Lead Company's general manager in Cincinnati, and thereafter consulted with the management committee composed of Bendelari, president, MacGregor, vice president, and Hummell, secretary-treasurer. McMullen testified that the committee desired to move the research department to Cincinnati and to "improve the efficiency of the department." McMullen then went to Joplin, where he remained for 2 or 3 weeks, reading the department's past reports, talking to the individual chemists, and otherwise investigating the operation of the laboratory. Thereafter, McMullen submitted a report addressed to MacGregor in Cincinnati, and dated November 13, 1935. The report is "of my trip to Joplin to render an opinion on the advisability of moving the Research Department to Cincinnati and also to in-

investigate general conditions." It was directed chiefly toward the former question, and recommended such a move because of the lost efficiency occasioned by geographical considerations.¹⁰⁸ McMullen reported that "the personnel of the Research Department consists of high-grade intelligent men whose present morale is extremely low since they consider a great deal of their effort is wasted"; that "By the application of business expediency and a broader point of view, the constructive work of the Research Department could be doubled"; and that the work in the department is "very inefficient. The actual work done by the laboratories is not properly supervised. Each laboratory head carries on his problems, holding to the exact detail of a written instruction, without helpful suggestions or constructive criticism. The criticism usually has more to do with the form and accuracy of the technical detail than the value of the new product or process." In his report, McMullen did not expressly relate Sheppard to these alleged faults but the general tenor of the report was that the situation would be remedied by moving the department to Cincinnati. In his testimony at the hearing, McMullen further criticized Sheppard, stating that the relations between the employees and Sheppard were "very bad"; that every employee, without exception, criticized Sheppard during McMullen's investigation; and that the research reports were "too verbose" and technical, and "too involved for the average person to read." McMullen testified that subsequent to his submission of the written report, he "amplified that report in several oral conferences" with the management committee. At these conferences, according to McMullen, he recommended the dismissal of Sheppard. Thereafter, the management approved McMullen's report and offered McMullen the position of research director. McMullen testified that he accepted on condition that Sheppard be removed, and the committee agreed. On December 7, 1935, McMullen assumed his duties as research director of the Lead Company at Joplin.

Harner's testimony was directed chiefly towards Sheppard's personal relationship with his subordinates. Harner testified that in 1927, when Sheppard assumed charge of the laboratory, Sheppard was so dictatorial and made such obscene remarks that Harner left the laboratory and worked elsewhere. In 1930, Harner returned, having been rehired by Sheppard. Harner testified that the employees had continual arguments with Sheppard over "whether the commas were right" in the reports; that when Harner returned in 1930, the situation "wasn't as bad as before"; that Sheppard "was accustomed to pound the table vigorously and talk in a loud tone of voice. He enjoyed 'hooking' somebody on any mistake they made"; and that Sheppard treated his subordinates "as though you were a

¹⁰⁸ The department was still located in Joplin at the time of the hearing.

machine sitting there and he was another machine tearing up the report in an absolutely mechanical manner." Harner could not recall, however, whether he had told McMullen anything about Sheppard "specifically" when McMullen was investigating.

Sheppard denied that he had any difficulties with his subordinates; he expressly denied the obscene and intemperate language attributed to him, by Harner; he denied that he had received any complaints either from the management or from his subordinates. On the contrary, he testified, and we find, that on his departure on November 30, 1935, the entire laboratory staff presented him with an electric clock and that Harner, with whom his relations had always been friendly, made the presentation speech. Further, the Board's counsel submitted in evidence many Christmas cards sent to Sheppard by the members of the laboratory staff both in 1936 and 1937, long after Sheppard had left the respondent Lead Company's employ. Included among these cards was one from "Harold and Esther Harner" on which Harner had written a special greeting. In view of the testimony of Harner and McMullen concerning the situation in the laboratory, we regard these cards as being relevant and of some significance. Moreover, it is undenied that between 1933 and 1935 Fred Clearman and Percy Ebert, two of Sheppard's subordinates, specifically expressed appreciation to Sheppard for the latter's method of handling reports; that MacGregor, who supervised the research department, expressed approval of the reports; that several of these reports were reprinted and published by the respondent Lead Company; that in 1928 when, according to Harner, conditions were at their worst, MacGregor brought the technical salesmen to the laboratory for 10 days, stating to Sheppard that "he wanted them to get the viewpoints that I [Sheppard] implanted in my own men"; that at the same time, MacGregor wrote Sheppard that "I cannot speak too highly of the organization of the operations in your various departments. It certainly is a pleasure to work with you." ¹⁶⁹ that often thereafter, MacGregor "commented favorably" on the department's organization; and finally, that when Sheppard was discharged, MacGregor, the company executive to whom McMullen's report had been addressed and who had the most direct contact with the laboratory, told Sheppard that the dismissal was contrary to his recommendation. Floyd Reed, a witness for the respondents, who worked in the laboratory from 1927 to 1934, testified that his relations with Sheppard in the course of his research work were "very friendly" and that he did not feel that Sheppard misused him. Frederick Clearman, also a witness, called by the respondents, worked in the

¹⁶⁹ Although this letter is remote in time, we deem it relevant in view of Harner's testimony that conditions were, during this period, so bad that Harner left; and that on his return in 1930, conditions had improved.

laboratory as chief research metallurgist from 1930 to 1933, and testified that he had always been very friendly with Sheppard and that he liked Sheppard.

Under all the circumstances, we are impelled to reject the respondents' evidence concerning Sheppard's faults and difficulties. Not only does the direct testimony adduced thereon fail to establish his inefficiency and improper conduct,¹⁷⁰ but the circumstances of Sheppard's employment history points to the contrary. We are unable to believe that Sheppard could have been as inefficient, unpleasant, and unsatisfactory from 1927 until 1935 as testified to by Harner and McMullen without complaints arising long before 1935. Had Sheppard had all the faults attributed to him, it is incredible that he should have been retained for 8 years, during the early part of which period his salary was consistently raised and throughout which period his responsibilities were increased.

The respondents contend, however, that the actual fact of Sheppard's ability is irrelevant since the cause of Sheppard's discharge was McMullen's report upon which the respondents could properly rely.¹⁷¹ Apparently adopting this contention, the Trial Examiner recommended dismissal of the complaint in so far as it alleged that Sheppard was discriminatorily discharged. The Trial Examiner based his recommendation on two chief grounds: (1) that by September 26, 1935, Sheppard had finally complied with the respondents' orders concerning the Tri-State Union, yet Sheppard did not cease to be an employee of the respondent Lead Company until November 29, 1935; and (2) that, regardless of the basis of McMullen's report, the respondents relied upon it and to sustain the allegations of the complaint with respect to Sheppard, "it would be necessary to find that the sending of McMullen to Joplin was with the preconceived intent to have McMullen report unfavorably on Sheppard and then discharge him." Under analysis of the evidence, however, these grounds disappear.

The chronological hiatus between Sheppard's resistance to the Tri-State Union and his eventual discharge is more apparent than real. As described above, Sheppard first opposed Vaughn's directions that Sheppard's subordinates be instructed to join the Tri-State Union on August 27, 1935. After appeals to MacGregor, Sheppard's opposition was apparently successful and on September 6, the laboratory employees were notified that they were free to remain out

¹⁷⁰ Harner's inconsistencies concerning the Tri-State Union have been described above and throw considerable doubt on his credibility. Similarly, the circumstances under which McMullen wrote his report, as described below, deprive the report—which itself does not deal specifically with Sheppard—of what weight it might otherwise have in establishing the fact of Sheppard's relationship with his subordinates.

¹⁷¹ Of course, the absence of a basis for such report and so for the cause of the discharge is some evidence of a lack of bona fides, as described below.

of the Tri-State Union. About September 17, 1935, the respondents renewed their attempts to have Sheppard coerce his subordinates; Sheppard again resisted and at first, even defied Potter's authority over him. On September 26 Sheppard finally submitted, but at the same time he protested the respondents' course to Potter and MacGregor. Within the next few days, Sheppard notified his employees that they were required to join the Tri-State Union.

Little time elapsed between Sheppard's resistance and the respondents' initial steps to replace him. McMullen was vague and uncertain concerning the precise date when he was retained by the management committee. On direct examination, he stated that he believed he was hired "during October." When asked for the specific date on cross-examination, McMullen said that "I would not be sure of the date." After conferences with the management, he spent 2 or 3 weeks investigating at Joplin. His report was completed on November 13. It is evident, therefore, that McMullen was retained within not more than 2 weeks after Sheppard's difficulties in regard to the Tri-State Union.¹⁷²

Nor are we able to find that McMullen's investigation and report were the cause of Sheppard's discharge. Although McMullen testified that the matter of Sheppard's removal had never been mentioned in October by the management, he nevertheless knew that he was to investigate Sheppard. At the time McMullen was retained he was "virtually unemployed." In connection with McMullen's purposes in going to Joplin in October, the following testimony was elicited after McMullen was asked whether one of the purposes was that McMullen might be permanently employed by the respondent Lead Company:

A. (by McMullen): That might or might not be the case. It was not contingent on the first trip.

Q. (by Mr. Wolfe): But you had that in mind when you left Cincinnati and came to Joplin?

A. It was possible.

Q. And you were desirous at that time of obtaining a permanent situation with the company, if you could work out the details with them?

A. If the position was satisfactory, yes.

Q. Didn't you know during the time that you were having these preliminary discussions with the gentlemen in Cin-

¹⁷² The International Union contends in its brief, and we agree, that what lapse of time did occur is still less significant under the peculiar circumstances of the case. Sheppard's job was one requiring expert technical as well as executive ability. Shaeffer, the respondents' other top laboratory employee, had left a short time before. Unlike ordinary employees, Sheppard was not easily replaceable and some time was necessarily consumed before a satisfactory successor could be found. As described immediately below, McMullen was at this time already chosen as Sheppard's successor.

cinnati, and after you came down here, that there was a good possibility of you taking charge down here?

A. There was a possibility, but it was not all settled . . . The surroundings of the position, the work that was required of the position, were all unknown to me. *I had to find out what they were before I could accept it.*¹⁷³

We find that before McMullen went to Joplin at all, the respondent Lead Company had determined to hire McMullen and discharge Sheppard.

Further, serious chronological difficulties militate against acceptance of the respondents' contention that they relied on McMullen's report and McMullen's refusal to work with Sheppard. Sheppard's testimony is undenied that MacGregor notified Sheppard on or before November 15, 1935, that the latter's connections with the Lead Company were going to terminate. Yet McMullen did not complete his investigation and written report until November 13. As described above, McMullen testified that he offered more specific criticism of Sheppard and recommended his removal at conferences thereafter in Cincinnati. Following these several conferences, the management committee met and adopted McMullen's report. Then MacGregor notified Sheppard to come to Cincinnati, where Sheppard was told of his discharge. It is fair to assume that McMullen's report, dated November 13, was submitted sometime thereafter, and that the various conferences consumed still further time. Under these circumstances, we find it difficult to believe that Sheppard's discharge on or before November 15, 1935, was based on McMullen's report.

Further indication of the respondents' preconceived intent to discharge Sheppard lies in the undenied fact that, when McMullen first came to Joplin in October, Sheppard's first contact with him was through Potter. Potter called Sheppard to Potter's office, where the latter introduced Sheppard to McMullen and explained that McMullen was "looking over" the Lead Company. As described above, Potter was the resident vice president of the respondent Mining Company, while the research department was a part of the Lead Company. Campbell's testimony, coupled with MacGregor's letter to Sheppard described above, established that Potter's only connection with the Lead Company was in respect to labor relations. That McMullen should first have consulted Potter indicates that McMullen's visit was connected with the problem of labor relations, rather than with any technical problems faced by a department of the Lead Company—with which Potter would be unfamiliar.

Finally, neither the person who first got in touch with McMullen, nor the members of the management committee which gave him his

¹⁷³ Italics supplied.

initial instructions or purportedly passed on his report, nor Potter was called upon to testify.

In view of all these circumstances and in the light of the respondents' course of conduct as disclosed by the entire record, we find that the respondents had determined to discharge Sheppard when they hired McMullen, and that McMullen's subsequent reports were not the moving factors in Sheppard's discharge. The respondents contend, however, that the Board cannot take cognizance of Sheppard's case since, as an officer of the respondent Lead Company, Sheppard is not an employee within the meaning of the Act. We have previously rejected a similar contention, stating:

Although anti-union conduct of managerial or supervisory employees has been repeatedly held proof that the employer has engaged in unfair labor practices, it does not follow that managerial or supervisory employees are not employees within the meaning of Section 2 (3) of the Act. The statutory definition is of wide comprehension.¹⁷⁴

Sheppard is an employee within the meaning of the Act.

We find that the respondent Lead Company, by discharging Sheppard on or about December 1, 1935,¹⁷⁵ discriminated in regard to his hire and tenure of employment, thereby encouraging membership in the Tri-State Union, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Sheppard did not earn any salary or other income after his discharge other than approximately \$140. In August 1937, he entered into a contract with a Joplin businessman whereby Sheppard agreed to engage in certain research work and the businessman agreed to pay for all necessary expenses. If the experiments lead to any results, Sheppard and the other person are each to own an undivided half interest. Sheppard testified that he was experimenting on the development of a particular idea which, if successful, would be very valuable. He "hoped" for success but testified that there was no way to know whether any results would be reached. Other than his expenses and the potential return if the experiments are successful, Sheppard earned no salary or other income by virtue of this agreement. The respondents contend that all chemistry work is dependent on future development and that Sheppard has obtained regular and substantially equivalent employment. In view of the extremely speculative nature of Sheppard's present occupation, and in view of the steady and substantial salary which he earned while working for the

¹⁷⁴ *Matter of Atlantic Greyhound Corporation and Brotherhood of Railroad Trainmen*, 7 N. L. R. B. 1180, 1196.

¹⁷⁵ The date when Sheppard's discharge became effective.

respondent Lead Company, we find that Sheppard has not obtained regular and substantially equivalent employment.

G. The alleged refusal to bargain collectively

The complaint alleges that the employees of both respondents, engaged in ordinary productive work, exclusive of those engaged in work which is of an executive, managerial, technical, or clerical nature, constitute a unit appropriate for purposes of collective bargaining; that the International Union, prior to May 8, 1935, represented a majority of such employees; and that the respondents have at all times refused to bargain collectively with the International. During the hearing, the complaint was amended to allege that either the unit originally alleged or, in the alternative, the productive employees of each respondent separately constituted appropriate units.

The Trial Examiner, in his Intermediate Report, found that the evidence failed to show that the International at any time represented a majority of the employees alleged to constitute either of the alternative appropriate units. He accordingly recommended that the complaint, in so far as it alleged that the respondent had refused to bargain collectively with the International, be dismissed. The International did not except to these findings or to the recommendation.

The evidence fails to establish that the International, on or after May 8, 1935, represented a majority of the respondents' employees in an appropriate unit. The evidence further shows that in the period in question, the International itself was unable to determine the precise extent of its own membership.

We find, therefore, that the International Union did not represent a majority of the respondents' employees in an appropriate unit or units, and that, therefore, the respondents, or either of them, have not refused to bargain collectively with the International within the meaning of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

We find that the activities of each of the respondents set forth in Section III D, E, and F above, occurring in connection with the respective operations of such respondent and/or the operations of the other respondent, described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.¹⁷⁸

¹⁷⁸ See footnotes 12 above.

V. THE REMEDY

It is essential in order to effectuate the purposes and policies of the Act that the respondents be ordered to cease and desist from certain activities and practices in which we have found them to have engaged. Further to effectuate the purposes and policies of the Act, and as a means of removing and avoiding the consequences of the respondents' unfair labor practices, we shall, in aid of our cease and desist order, order the respondents to take certain affirmative action, more particularly described below.

We have found that the respondents, and each of them, have participated in, contributed to, encouraged, authorized and ratified acts of violence directed against the International and its members. We shall order the respondents to cease and desist therefrom.

We have found that the respondents, and each of them, have since July 5, 1935, dominated and interfered with the administration of the Tri-State Union and have contributed support to it; that the respondents have at no time ceased dominating and interfering with its administration, and that the Tri-State Union in fact continues to the present, although now affiliated with the American Federation of Labor under the name of the Blue Card Union. As heretofore found, the respondent Mining Company entered into an agreement on June 8, 1935, with the Tri-State Union, granting to that union at least a preferential shop, excluding International members from employment, and recognizing the Tri-State Union as exclusive bargaining agent. We have found further that although this agreement in terms was with only the Mining Company, it was applied in actual practice by the Lead Company to the latter's employees. We have found that at no time was this agreement repudiated by the respondents. From what has been previously set forth, it is manifest that the contractual relationship which was established on June 8, 1935, and existed thereafter, between the respondents and the Tri-State Union, has been part of the systematic utilization by the respondents of an employer-created labor organization to stifle self-organization among and defeat collective bargaining by employees of the respondents. It is also plain that this contractual relationship and the agreement were instrumentalities adopted by the respondents for supporting, dominating, and interfering with the formation and administration of the Tri-State Union, and the media for otherwise frustrating the employees of the respondents in the exercise of rights guaranteed by the Act. Under these circumstances, we shall order the respondents to cease giving effect to such written or oral agreement with the Tri-State Union.

In addition to requiring the respondents to cease and desist their specific unlawful activities as to the Tri-State and Blue Card Unions, we deem it necessary to make a further order in this respect. Since

no violation of Section 8 (2) of the Act is alleged, we shall not order the respondents to disestablish the Blue Card Union completely as a bargaining representative of any of its employees. However, we shall order what appears to us to be a minimum requirement if any opportunity for free self-organization is to be afforded the respondents' employees: the respondents will be ordered to withhold exclusive recognition from the Blue Card Union or any other labor organization of its employees, unless and until such organization is certified by the Board as exclusive representative in an appropriate unit;¹⁷⁷ the respondents will also be ordered to withhold recognition of the Blue Card Union as representative of any of its employees unless similar recognition is granted to the International, or unless and until the Blue Card Union is certified by the Board as exclusive representative.

We have found that the respondent Lead Company has discriminated in regard to hire and tenure of employment, within the meaning of the Act, in discharging Timothy Rayon on or about September 16, 1935, and John R. Sheppard on December 1, 1935. Accordingly, we shall order said respondent to make these employees whole for any loss of pay they suffered by reason of their respective discharges, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages or salary from the date of his discharge to the date of reinstatement, less his net earnings¹⁷⁸ during said period. However, inasmuch as the Trial Examiner failed to find discrimination with respect to the discharge of Sheppard, the respondent Lead Company, in accordance with our usual rule,¹⁷⁹ will be relieved of paying Sheppard back pay with respect to the period from the Trial Examiner's Intermediate Report, August 31, 1938, to the date of our Order.

We have further found that the respondents on July 5, 1935, discriminated in regard to hire and tenure of employment by discharging and refusing to employ, except upon compliance with an illegal

¹⁷⁷ See *Matter of Lenox Shoe Company, Inc. and United Shoe Workers of America*, 4 N. L. R. B. 372; *Matter of Mt. Vernon Car Manufacturing Company, a corporation and Local Lodge No. 116, Amalgamated Association of Iron, Steel, and Tin Workers of North America*, 11 N. L. R. B. 500; *Matter of Pilot Radio Corporation and United Electric & Radio Workers of America*, 14 N. L. R. B. 1084.

¹⁷⁸ By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Union, Local 250*, 8 N. E. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects are not considered as earnings, but as provided below in the Order, shall be deducted from the sum due the employee, and the amount thereof shall be paid over to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects.

¹⁷⁹ *Matter of E. R. Hagelinger Company, Inc. and United Wall Paper Crafts of North America, Local No. 6*, 1 N. L. R. B. 760, 767.

condition, those of its employees who had gone on strike on May 8, 1935, and were still on strike on said July 5. We have listed in Appendix A all such employees against whom the respondent Lead Company has thus discriminated. Appendix B is a similar list pertaining to the respondent Mining Company. We shall order the respondent Lead Company to offer reinstatement¹⁵⁰ to their former or substantially equivalent positions to all the striking employees listed in Appendix C, or if no such positions be available, then to positions for which they may be qualified. We shall also order the respondent Mining Company to offer reinstatement to their former or substantially equivalent positions to all the striking employees listed in Appendix D, or if no such positions be available, then to positions for which they may be qualified. We find below that certain persons, listed in Appendices E and F, have obtained regular and substantially equivalent employment but did not testify that they do not desire reinstatement.¹⁵¹ The respondents contend that only "employees" within the meaning of Section 2 (3) fall within the jurisdiction of the Board for purposes of remedial action, and that those who have obtained such regular and substantially equivalent employment are not such employees. While Section 10 (c) provides for reinstatement of "employees," we do not believe that those claimants who have obtained regular and substantially equivalent employment thereby became remediless, either for the purposes of back pay or for purposes of future employment by the respondents. We shall, therefore, order all persons listed in Appendices E and F to be offered employment in the same manner as the employees are to be offered reinstatement as set out in the preceding and in the following sentences. The offer of reinstatement shall be without prejudice to the employees' former rights and privileges. All, or such number as may be necessary, of the employees presently working for the respondents who were hired after July 5, 1935, the date on which the conditions of employment imposed by the respondents became illegal, and whose names do not appear on the pay rolls for the week including May 8, 1935, or were not employed by the respondents during the period between that date and July 5, 1935, shall be dismissed, to provide employment for those to be offered and who shall accept reinstatement. If thereupon, despite such dismissal, there is not sufficient employment immediately available for all of said employees to be offered and who shall accept reinstatement, all

¹⁵⁰ For reasons similar to those stated above, and to those stated in prior cases, we do not believe that the policies of the Act will be effectuated by the Board's exercising its discretion to bar strikers guilty of violence in this case. *Cf. Matter of Republic Steel Corporation and Steel Workers Organizing Committee*, 9 N. L. R. B. 219, 387, and cases cited in footnote 158 above. In the case of convictions by the Kansas military court, the accused were not represented by counsel or confronted by witnesses.

¹⁵¹ Persons who were reinstated by the respondents are here excluded.

available positions, if any, shall be distributed among such employees, without discrimination against any employee because of his union affiliation or activities, following such procedure and system of employment as has heretofore been applied in the conduct of the respondents' businesses. Those of such employees for whom no employment is immediately available and those who are reinstated only to positions for which they were qualified but not to their former or substantially equivalent positions, shall be placed on a preferential list and, in accordance with such list, be offered reinstatement in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work.¹³²

In cases where we have found that certain employees were discriminatorily discharged or refused reinstatement, we have ordinarily ordered the offending employer to make them whole with back pay, this being an amount equal to what they would have earned with the employer from the date of the discrimination to the date of reinstatement pursuant to our order, less net earnings elsewhere during the same period. The objective is, of course, to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. Our order in the present case is designed to achieve the same objective, but the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo. Thus, there were approximately 1,100 employees working for the respondents on May 8, and by July 5, 1935, only approximately 600. Of the 500 not working then, some 350 are claimants in this case, and we have found discrimination as to about 200. We have found above that after July 5, 1935, a substantial number of additional men were put to work, but it is apparent from the record that the total pay roll fell a good deal short of the 1,100 figure obtaining before the strike. Thus we have the following situation: had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work, since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of the claimants discriminated against would have returned, but here again, we cannot tell which ones. It does not appear from the record that the respondents followed any set standards, such as seniority, in taking the men back. It does appear that as to most positions, one applicant would be as well qualified as another, since no special skills or abilities are ordinarily necessary. The only discernible standards used seemed to be two: a re-

¹³² The respondents shall be considered as separate entities for the purposes of this process of reinstatement.

quirement of a blue card, and "first come, first served." On this state of the facts, we have no way of knowing which men would have been reinstated had the respondents acted legally—how many non-claimants, how many claimants whose cases we are dismissing,¹³³ how many claimants whose cases we are sustaining.

We might with some logic order the respondents to reconsider their course of reinstatements, putting aside the discriminatory factors which they have employed, and to determine now which employees they would have taken back after July 5, 1935, had they been acting legally; back pay would then be due to those of the claimants who would have been called, and nothing would be due to those whom the respondents now decide they would not have reinstated 4 years ago. Among other cogent objections to this procedure is the fact that this determination would be substantially impossible, and the question of back pay would entail endless negotiation and speculation, with attendant delays when a solution of the problems has already been too long delayed. Further, in the light of the whole record, we do not believe that it would effectuate the purposes of the Act thus to permit the determination of the back pay due to rest almost wholly within the discretion of the respondent, with no objective standards available by which a third party could test their determination. We reject this method, and turn to the only solution that seems fair, workable, and calculated to serve the purposes for which it is intended.¹³⁴

A lump sum shall be computed, consisting of all wages, salaries, and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against.¹³⁵ The lump sum shall consist of all such monies so paid to such persons during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents

¹³³ Our findings above do indicate that some of the claimants whose cases we are dismissing would not have been reinstated—such as those who had filed disability claims against the respondents. But this is not ascertainable as to others—such as those who did not testify at the hearing.

¹³⁴ In the cases of Sheppard and Rayon, whom we have found to have been discriminatorily discharged, the ordinary method of computing back pay shall be applied.

¹³⁵ If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum.

acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establishing the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents' pay rolls of May 8, 1935, who applied for work with the respondents, whether successfully or not, after July 5, 1935.¹⁵⁶ Let us assume for purposes of illustration that the lump sum amounts to \$360,000, that there are 200 claimants discriminated against, and that there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus, we assume that two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against. This sum is then to be apportioned among the claimants discriminated against. The portion to be credited to each such claimant will not be the same, since some of the claimants had higher paying jobs with the respondents, and they should receive a proportionately larger share of the lump sum. This proportion is to be computed by dividing the average annual earnings of the particular claimant, when employed by the respondents, by the average annual earnings of all such claimants when so employed.¹⁵⁷ Thus, assuming that the average annual earnings of all the 200 such claimants (still using illustrative figures only) were \$100,000, a particular claimant with average annual earnings of \$500 would be credited with one two-hundredth of the net lump sum, or \$1,200; one with a \$250 average would be credited with but \$600; one with a \$1,000 average would be credited with \$2,400.

After such individual apportionment is made, individual deductions are to be made from the sum credited to each claimant. A

¹⁵⁶ We are not including in this computation former employees who did not apply, since as to them, unlike the claimants discriminated against, there is no showing that they refrained from applying because of the blue-card requirement, rather than because of disinterest in reinstatement or other normal reasons. Nor are we including new applicants, since we make the normal assumption, based here on the respondents' actual practice, that the respondents would generally have taken back those employed by them prior to the strike, in preference to new applicants, had they acted without regard to illegal considerations.

¹⁵⁷ In some cases, such persons had not on May 8, 1935, been employed for a full year. In such a case, the shorter period shall be used as a representative basis for computation of annual earnings. Thus, if an employee had worked for the respondents for only 6 months, earning \$260, his average annual earnings shall be regarded as \$400. In many cases, the employees' annual earnings are listed since 1932. In such instances the annual earnings shall be averaged on the basis of those years. In no case will earnings before 1932 be considered. In all cases where the employees have not worked the entire period since 1932 but have worked for more than a full year, average annual earnings shall be computed on the basis of the full year or years before May 8, 1935.

deduction applicable to each is the amount of net earnings¹⁷⁸ of the particular individual during the period from July 5, 1935, to the date of his reinstatement or placement on a preferential list, except for earnings during periods excluded in computing his back pay, as discussed below. These deductions of net earnings are to be made individually from the sums credited to the particular claimant; the net earnings of all the claimants are *not* to be totalled and deducted in lump from the net lump sum referred to above. The amounts credited to certain claimants are to be subject to further deductions.

Since the Trial Examiner failed to find a violation of Section 8 (3) as to those persons who were alleged to have engaged in violence, those persons who were N. R. A. men, those who had worked at the Tulsa-Outpaw mine or other operations which had been curtailed, and other persons, we shall, in the exercise of our discretion, not require the respondents to reimburse any such employees for the period from the date of the Intermediate Report, August 31, 1938, to the date of our order. Also, since the Trial Examiner recommended that back pay for those persons who had been employed at the Bendelari mine cease on June 30, 1936, we shall exclude the period from August 31, 1938, to the date of our order, from computation. We shall also order a proportionate reduction for the period during which we have found certain persons to have been incapable of work because of ill health or to have been otherwise disqualified for a portion of the time. The periods which are to be excluded are listed in parentheses after the name of each claimant concerned in Appendix A and B. In the case of claimants for whom such periods are to be excluded, the computation shall be by proportionate reduction of the individual sum otherwise due. The proportion so reduced shall be determined by dividing the total number of days between the date of discrimination and the date of reinstatement or placement on a preferential list less the total number of days excluded in that period by the total number of days between the date of discrimination and the date of reinstatement or placement on a preferential list. This reduction is to be made before the reduction of net earnings. Thus, let us assume that a particular claimant's share of the lump sum, before his net earnings are subtracted, is \$1,200. Let us further assume that 1,500 days have elapsed between the date of discrimination and the date of reinstatement or placement on a preferential list; and that we have excluded the claimant from back pay for a period of 500 days. The sum due him, before subtraction of net earnings, would be two-thirds of \$1,200 or \$800.

The computation described above shall be made separately for each respondent. The ultimate individual sum arrived at shall be

¹⁷⁸ See footnote 178 above.

paid, in the case of the respondent Lead Company, to persons listed in Appendix A, and in the case of the respondent Mining Company, to persons listed in Appendix B. In the case of W. E. Honeywell, the sum which would have been due him shall be paid over to Hazel Honeywell, his duly appointed administratrix.

The question is raised by the record whether the respondents should be permitted to deduct from the back pay due under our order monies received by an employee for work performed upon Federal, State, county, municipal, or other relief projects during the period for which the respondents are under obligation to pay such employee back wages. In so far as the employee receives remuneration for such work during periods when he would otherwise have been working for the respondent, it would not seem necessary, in restoring him to the status quo, to require the respondents to reimburse him in such amounts. Nevertheless, to hold that the losses accruing from the respondents' unfair labor practices must be borne by the government or governments financing the work-relief project would not effectuate the policies of the Act. We shall, therefore, order the respondents to deduct such sums from the amounts otherwise due the employees and to pay such deductions over to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments, which supplied the funds for the work-relief project.¹⁰⁰

We have discussed above the remedy to be applied as to individuals who obtained regular and substantially equivalent employment after the respondents discriminated against them, but who may, nevertheless, desire reemployment. The issue of regular and substantially equivalent employment is raised by the respondents as to a large number of the individual complainants. Before turning to the discussion of each individual concerning whom the respondents have made this claim, we shall first briefly state the various factors entering into the determination of "regular and substantially equivalent employment."

We regard various factors of importance on this issue. These factors include, of course, a comparison of the wages which the employee would have earned had he remained with the respondents and the wages which he actually earned in working for others. Comparative working conditions are also of importance. We shall take into consideration the type of employer with whom the particular person has obtained employment, particularly in view of the fact that the respondents are large employers for whom the danger of permanent shut-down, insolvency, and other risks are less great than in the case of operators who own only one small mine. Geo-

¹⁰⁰ *Matter of Republic Steel Corporation and Steel Workers Organizing Committee*, 9 N. L. R. B. 212, 395; *Matter of The Dow Chemical Company and United Mine Workers of America*, District No. 50, 13 N. L. R. B. 993.

graphical considerations shall also be given weight: we recognize that it is a severe hardship for the employees to have had to leave the Tri-State area, where they had lived and where their families were settled. The mere fact that employment obtained elsewhere was stated by the subsequent employer to be of indefinite duration will not establish that such employment was equivalent if it was in fact for only a comparatively brief period.¹⁰⁰ With these factors in mind, we turn to a consideration of each employee concerning whom the respondents make the claim of regular and substantially equivalent employment. We shall not discuss individuals in this category whose cases are to be dismissed on other grounds.

William Harry Allen is claimed to have obtained regular and substantially equivalent employment with the B. H. & W. Mining Company on July 16, 1937. His average annual earnings with the respondent Mining Company prior to the strike were \$647.84. He denied that he had ever worked for the B. H. & W. Mining Company, and checks from that Company endorsed by one "H. Allen" do not bear a signature similar to the claimant's. Further, one of the checks from that company to H. Allen was dated August 6, 1937, a time when the claimant was ill and unable to work, having just had an operation at a hospital. We find that William Harry Allen has not obtained regular and substantially equivalent employment.

William Atkinson is claimed to have obtained regular and substantially equivalent employment with the Canadian Mining & Development Company on January 9, 1936. Atkinson earned \$431.70 while working for the respondent Mining Company between September 1934 and May 2, 1935. He testified that his work for the Canadian Company was at first irregular and lasted for only 3 weeks. On February 3, 1936, he returned to work for the Canadian Company and remained for 2 months. During this period, however, he obtained only 3 weeks' actual work, and the job ended when the entire project shut down because "the dirt ran out." We find that William Atkinson has not obtained regular and substantially equivalent employment.

Ernest Bankhead is claimed to have obtained regular and substantially equivalent employment on October 29, 1936. His average annual earnings with the respondent Mining Company up to the time of the strike amounted to \$754.05. With the Berg Company, Bankhead worked from October 29, 1936, until June 24, 1937. On October 18, 1937, he returned to the Berg Company and worked until Febru-

¹⁰⁰ The respondents sent questionnaires to employers who had subsequently employed the claimants herein. Among the questions asked was: "Was his employment considered by you as temporary or until a particular job was completed, or was he employed as long as he made good?" The answers to these questions were submitted in evidence by the respondents.

ary 10, 1938, when he quit because he had saved enough to be able to return to the Tri-State area to see his mother, with whom he lives. The Berg Company is located in California, where, according to Bankhead, his living expenses were much higher. Bankhead earned \$4.40 a day acting as foreman for the Berg Company, and earned a total of \$1,271 with that company. Because of geographical considerations and his absence from his family, we find that Ernest Bankhead has not obtained regular and substantially equivalent employment.

Theodore R. Bennett testified that he obtained "a better job" on April 15, 1937, and does not desire reinstatement. We find that on April 15, 1937, Theodore R. Bennett received regular and substantially equivalent employment.

A. G. Black is claimed to have obtained regular and substantially equivalent employment with the Montana Gold Company on July 6, 1936, and with one Moore on September 19, 1937. Black's average annual earnings with the respondent Mining Company prior to the strike were \$913.45. He worked for the Montana Gold Company from July 6 to September 18, 1936, working 7 days a week, from 8 to 12 hours a day. He testified and we find that he received \$150 a month with that Company, or a total of \$440, and that the job ended when the business reorganized and failed to reopen. On September 19, 1937, he began to work for Moore, a mine operator. He received \$4.50 a day and continued to work for Moore until the time of the hearing, March 19, 1938, having earned a total of \$745.44. Black testified that this work was for a "small company in a bunchy ground neighborhood." We find that A. G. Black has not obtained regular and substantially equivalent employment.

Henry Bloom is claimed to have obtained regular and substantially equivalent employment in May 1937 with the Pacific Coast Borax Company. This Company is at Hinckly, California, where Bloom worked from May 13 until November 5 and from December 3 to 24, 1937. He earned a total of \$942.50. This job ended "due to reduction of forces account no orders." Because of geographical considerations and because of the termination of the job, we find that Henry Bloom has not obtained regular and substantially equivalent employment.

Fred Bogle, Jr., is claimed to have obtained regular and substantially equivalent employment with the American Smelting & Refining Company at Selby, California, on December 12, 1935, and also with the Pittsburg Sand Company in California, in September 1936. Bogle's employment with the American Smelting & Refining Company lasted from December 12, 1935, until July 22, 1936, and he earned a total of \$620.60, as compared to his average annual earnings

with the respondent Mining Company of \$439.29. He testified that the work at the American Smelting & Refining Company was unpleasant, since it was very dusty and in a closed room, with the result that he suffered from frequent colds. He left this job because of these conditions and because he wished to visit his family in the Tri-State area. In September 1936, Bogle returned to California and worked for the Pittsburg Sand Company until December 22, 1937. He averaged \$25 a week and totaled \$1,500. Bogle testified that this was a "steady and regular job" and that the working conditions were good. On December 22, 1937, he was temporarily laid off because of curtailment of operations, but he expected to return to work. He is now permanently domiciled in California. We find that in September 1936, Fred Bogle, Jr., obtained regular and substantially equivalent employment with the Pittsburg Sand Company, but that he did not obtain such employment before that date.

Mark Bond is claimed to have obtained regular and substantially equivalent employment on September 2, 1937, with the Big Blue Mine, Kernville, California. Bond's average annual earnings with the respondent Mining Company prior to the strike had been \$350.17. Bond worked for the Big Blue Mine only from September 2 to 11, 1937, and earned \$50, having worked 7 days a week, as compared to the 5-day week at the respondent Mining Company before the strike and the 6-day week thereafter. Bond left the Big Blue Mine because of the bad air in the mine. In view of the actual length of his employment, of the conditions of employment, and of geographical considerations, we hold that Mark Bond has not obtained regular and substantially equivalent employment.

Roy Boyd is claimed to have obtained regular and substantially equivalent employment on September 18, 1935, with the American Smelting & Refining Company at Selby, California. Boyd's average annual earnings with the respondent Mining Company prior to the strike were \$640.08. He worked for the American Smelting & Refining Company from September 18, 1935, until July 22, 1936, and during this period earned a total of \$786.25. He left the employ of the American Smelting & Refining Company because his mother became ill and he had to return to the Tri-State area. He also testified, and we find, that he would have been laid off shortly. Boyd next obtained employment with the Hazel Atlas Glass Company in Pittsburg, California, from April 6 to December 23, 1937. He earned \$5.28 a day and totalled \$900. He testified that he left this job because business became slack and he was laid off. However, in answer to a prior questionnaire he had stated that the reason he left was because he had "heard the strike in the Tri-State District was about to be settled, so I went to Kansas." Because of geographical considerations, we find

that Roy Boyd has not obtained regular and substantially equivalent employment.

Ulyes Bradbury is claimed to have obtained regular and substantially equivalent employment with the Federal Mining & Smelting Company on September 27, 1937. This Company is located in Baxter Springs, Kansas. Bradbury's average annual earnings with the respondent Mining Company prior to the strike were \$452.59. He worked for the Federal Mining & Smelting Company from September 27 to December 15, 1937, when his employment ceased because the mine shut down. At the Federal Mining & Smelting Company, Bradbury earned \$263. In view of the actual length of his employment with the Federal Mining & Smelting Company, we find that Ulyes Bradbury did not obtain regular and substantially equivalent employment.

Nick Bratz is claimed to have "probably" obtained regular and substantially equivalent employment with the Bennett Coal Company sometime in 1936, from which Company he earned \$80 and board. His employment with that Company was for two periods of 6 and 9 weeks, respectively. Bratz's average annual earnings with the respondent Mining Company prior to the strike had been \$350.05. In March 1937, Bratz began to work for the Darwin Lead Company, at Darwin, California. He worked from September 1 to 14, 1937, and earned a total of \$55. This job ended when the mine shut down. In view of geographical considerations and the actual length of his subsequent employment, we find that Nick Bratz has not obtained regular and substantially equivalent employment.

Paul M. Brooks is claimed to have obtained regular and substantially equivalent employment by virtue of the fact that he has become a farmer. From January 1 until May 8, 1935, Brooks earned \$183 working for the respondent Mining Company. He was engaged in farming after May 8, and until the hearing. The total expenses of running his farm were \$1,235 and the total earnings were \$1,516. His net earnings from the farm over a period of 3 years were \$281. We find that Paul M. Brooks has not obtained regular and substantially equivalent employment.

James O. Bryant is claimed to have obtained regular and substantially equivalent employment with the Albertoli Mining Company in December 1936 and the W. H. Mining Company in July 1937. His earnings with the respondent Mining Company were \$312.25 from October 22, 1934, until May 8, 1935. Bryant's employment with the Albertoli Mining Company lasted for only 4 weeks and ended when the ore "petered out." This job was in California. He worked for the W. H. Mining Company in the Tri-State area from July 8 to September 2, 1937, where he earned \$105.97. We find that James O.

Bryant has not obtained regular and substantially equivalent employment.

William Bryant is claimed to have obtained regular and substantially equivalent employment at the New Blue Mound Mine on November 1, 1936, and at the B. H. & W. Mining Company on March 1, 1937. Bryant had earned \$558.05 working for the respondent Mining Company from June 7, 1934, to May 8, 1935. He was employed at the New Blue Mound Mine in the Tri-State area from December 1 to 31, 1936,¹²¹ where he earned a total of \$87.50. The New Blue Mound Mine operated only one mine, and Bryant's job ended when that mine shut down. Bryant worked for the B. H. & W. Mining Company in the Tri-State area from March 11 to November 3, 1937, earning a total of \$360.3. This job also ended when the mine shut down. We find that William Bryant has not obtained regular and substantially equivalent employment.

Archie Lee Bunch is claimed to have obtained regular and substantially equivalent employment with the Mid-Continent Petroleum Company. Prior to the strike, Bunch's average annual earnings with the respondent Mining Company were \$435. He worked for the Mid-Continent Petroleum Company at Tulsa, Oklahoma, from August 5, 1936, until December 22, 1937. He worked for that Company as a common laborer and during the entire period earned \$1,100. However, his work was not regular, since in many of the months he worked only part time and sometimes as little as 10 days a month. This job ended when the Company laid off its crew because of slack work. We find that Archie Lee Bunch has not obtained regular and substantially equivalent employment.

R. F. Burgett is claimed to have obtained regular and substantially equivalent employment at the Iron Mountain Mine in August 1937, at the B. H. & W. Mining Company in September 1937, and at the Federal Mining & Smelting Company in November 1937. His average annual earnings with the respondent Mining Company prior to the strike were \$384. Burgett began to work for the Iron Mountain Mine on August 16 and continued to work until September 1, 1937. His total earnings were \$61.25. He worked for the B. H. & W. Mining Company from September 10 until October 29, 1937, earning a total of \$126.97. It is not clear whether he left this job voluntarily or whether the mine shut down. He worked for the Federal Mining & Smelting Company from November 25, 1937, to February 4, 1938,

¹²¹ In answer to the questionnaire sent by the respondents, the New Blue Mound Mine answered that Bryant's employment did not cease until May 20, 1937, and that he earned \$481.98. The B. H. & W. Mining Company wrote that it had employed William Bryant from March 11 until November 5, 1937. Bryant himself testified that he worked for the New Blue Mound Mine only during the month of December 1936. We find that the New Blue Mound Mine's answer was incorrect.

earning a total of \$260.70. He was discharged for cause. His work at the latter two mines was similar to his work with the respondent Mining Company before the strike and was at a wage similar to that paid during the same period by the respondent Mining Company. His work for the respondent had not been very steady. All of his subsequent employment was in the Tri-State area. We find that R. F. Burgett obtained regular and substantially equivalent employment on September 10, 1937, but that he did not obtain such employment before that date.

Grant Cavin is claimed to have obtained regular and substantially equivalent employment with the Darwin Lead Company on April 19, 1937. Prior to the strike his average annual earnings with the respondent Mining Company amounted to \$680. He began to work for the Darwin Lead Company in Darwin, California, on April 19 and continued in that Company's employment until April 28, 1937. He earned a total of \$37, and his employment ceased when the operations shut down. In view of the actual length of his employment with the Darwin Lead Company and its remoteness from the Tri-State area, we find that Grant Cavin has not obtained regular and substantially equivalent employment.

D. G. Creason is claimed to have obtained regular and substantially equivalent employment with the Dines Mining Company in the Tri-State area on March 18, 1937. His average annual earnings with the respondent Mining Company prior to the strike had been \$621. He worked for the Dines Mining Company from March 18 to 25, 1937, and earned a total of \$15.39. While working for the respondent Mining Company prior to the strike, Creason was paid by the can, and he was paid on a similar basis and at a similar rate with the Dines Mining Company. However, because the dirt at the latter mine was not as good as the dirt at the respondent Mining Company's mines, Creason averaged less at the Dines Mining Company. We find that D. G. Creason has not obtained regular and substantially equivalent employment.

James A. Curry is claimed to have obtained regular and substantially equivalent employment on August 25, 1937. His average annual earnings prior to the strike with the respondent Lead Company were \$616.81. On August 25, 1937, Curry began to work as a night watchman for the Central Foundry Company and was still working for that Company at the time of the hearing. He received \$2.40 a day and was required to work 7 days a week. Prior to the strike, while working for the respondent Lead Company, Curry earned \$3.20 a day for a 5-day week. We find, in view of the different nature of employment and the different working conditions, James A. Curry has not obtained regular and substantially equivalent employment.

Calvin Davis is claimed to have obtained regular and substantially equivalent employment on August 14, 1935, on January 1 and June 2, 1937. Prior to the strike his average annual earnings with the respondent Mining Company were \$430. He worked from August 14, 1935, until June 26, 1936, as a section hand on the "Frisco" Railroad. According to the questionnaire filled out by the "Frisco" Railroad, Davis "worked extra and regular, according to seniority," and was laid off because of a reduction in force. His hourly wages approximately 30 cents, and his total earnings were \$477. While working for the respondent Mining Company Davis earned \$2.80 a shift prior to the strike, and the evidence shows that after resumption of operations the wages in general were raised. Davis worked for J. A. Crain & Company from January 1 until March 15, 1937, as a truck driver and earned approximately \$300. He left J. A. Crain & Company when the work ceased. Davis next worked for the Sunflower Mining Company from June 2 until November 1937, where his total earnings were \$172.80. This mine was an old one which had been previously worked and which did not operate after November 1937. While working for the Sunflower Mining Company, Davis was engaged "mostly in gouging"—that is, reworking old dirt.¹²² We find that Calvin Davis has not obtained regular and substantially equivalent employment.

Clyde O. Dimitt worked on a farm subsequent to May 8, 1935. In the form of produce he has received \$625 from the farm, but has invested \$700 therein. We find that Clyde O. Dimitt has not obtained regular and substantially equivalent employment.

Jake C. Emerson is claimed to have obtained regular and substantially equivalent employment on July 14, on October 1, 1937, and on January 24, 1938. Emerson's average annual earnings with the respondent Mining Company prior to the strike, over a period of 3 years, amounted to \$86.89. On July 14, 1937, he began to work for the Y & W Mining Company in the Tri-State area and worked there until September 1937, earning a total of \$182. In view of Emerson's irregular employment with the respondent Mining Company prior to the strike, we find that he obtained regular¹²³ and substantially equivalent employment on July 14, 1937, but that he did not obtain such employment before that date.

¹²² The respondents placed in evidence the Sunflower Mining Company's answer to its questionnaire. This answer stated that Davis was still employed by the Sunflower Mining Company on March 10, 1938, and that he had earned a total of \$588.89. In the absence of further evidence on this issue, and in the absence of any cross-examination on the matter or of any reason to disbelieve Davis, we find that Davis' employment with the Sunflower Mining Company was as he testified.

¹²³ We interpret the language of Section 2 (3) of the Act, referring to "regular and substantially equivalent employment," as meaning employment substantially equivalent in regard to regularity as well as in regard to other factors.

M. C. Forrest is claimed to have obtained regular and substantially equivalent employment on January 4, in December 1936, and on July 7, 1937. Prior to the strike his average annual earnings with the respondent Mining Company were \$592.50. He worked for the Black Mining Company in the Tri-State area from January 4 until February 28, 1936, earning \$183.70. This job ended when he was laid off. He worked for the Loyce June Mining Company in the Tri-State area from December 1936 until March 17, 1937, where he admitted his job was "equivalent" to the job he had with the respondent Mining Company, and that he earned \$30 a week or \$8 more a week than he had earned with the respondent Mining Company. He testified, however, and in the absence of any conflicting evidence we find, that he lost his job with Loyce June Mining Company because of his failure to obtain a blue card. In view of the respondents' connections with the formation of the Tri-State Union and their requirement of a blue card, as described above, they cannot escape their obligations to reinstate employees who were victims elsewhere of the discriminatory requirement in the establishment of which the respondents played a major part. Forrest worked from September 7 to 21, 1937, for the Johnny Hicks Mining Company. His total earnings with that Company were \$46.28. We find that *M. C. Forrest* has not obtained regular and substantially equivalent employment.

Fred Foster is claimed to have obtained regular and substantially equivalent employment in September 1936. He worked for the respondent Mining Company from February 18 to May 8, 1935, and earned \$170.15. In September 1936 he began to work for the Foster Lumber Company in Indiana, and worked approximately half time until January 1937, earning during this period a total of \$168. Beginning in January 1937 he worked every day for the Lumber Company that the Lumber Company was operating, and earned a total of \$984 until December 15, 1937. His job with that Company terminated when he broke his arm, and he testified that he expected to go back to the Lumber Company as soon as his arm recovered. We find that in January 1937 *Fred Foster* obtained regular and substantially equivalent employment, but that he did not obtain such employment before that date.

Henry L. Freeman is claimed to have obtained regular and substantially equivalent employment on January 2, 1936. While working for the respondent Mining Company prior to the strike his average annual earnings were \$642. He worked for the Dines Mining Company in the Tri-State area from January 1 to March 15, 1936, where he earned \$2.50 a day, in contrast to his earnings of \$30 a week with the respondent Mining Company. At the Dines Mining Company he worked during the night, whereas with the respondent Mining Com-

pany he had worked during the day. Freeman left the Dines Mining Company "because there were too many boulders and too much powder shot in the air." In view of the different working conditions, as well as the difference in wages, we find that Henry L. Freeman has not obtained regular and substantially equivalent employment.

John E. Freeman is claimed to have obtained substantially equivalent employment on September 18, 1937. Between January 1 and May 8, 1935, Freeman earned \$182 working for the respondent Mining Company. He testified that he received no subsequent employment at any mines, and we are unable to find any evidence that he worked at any time for the Indian Mining & Royalty Company, with which respondents claimed he obtained equivalent employment. We find that John E. Freeman has not obtained regular or substantially equivalent employment.

W. S. Fulkerson is claimed to have obtained substantially equivalent employment on November 6, 1936, on January 30, on April 24, and on December 10, 1937. Fulkerson earned \$222 from January 1 to May 8, 1935, while working for the respondent Mining Company. He averaged \$4 a day. From November 6, 1936, until April 1937 he was employed by the Davis Big Chief Mine in the Tri-State area, averaging \$3.19 a shift and totalling approximately \$400 for the period. He left this job because he did not like the work there. From April 24 until June 24, and from December 10 until 17, 1937, Fulkerson worked for the Oko Mining Company as a shoveler, earning 12 cents per can, \$3 a day, and a total of \$189.34. This job ended when the mine shut down. We find that W. S. Fulkerson has not obtained regular or substantially equivalent employment.

Kenneth Gary is claimed to have obtained regular and substantially equivalent employment in August 1936 and April 1937. From January 1 to May 8, 1935, he earned \$228 working for the respondent Mining Company, earning \$2.50 a day, 5 days a week, 8 hours a day. From August 25 to October 1936 he managed an ice cream store, earning \$77.50. This job ended when the store closed. From April 20 to October 20, 1937, he worked for the Pacific Bottling Company in Oregon, earning \$2.50 a day and totalling \$375. While at the Bottling Company he was required to work 10 to 12 hours a day in contrast to the 8 hours a day he worked for the respondent Mining Company. We find that Kenneth Gary has not obtained regular or substantially equivalent employment.

Luke A. Griffitt began to work for the Federal Mining & Smelting Company in the Tri-State area on October 20, 1937, and was still employed by that Company at the time of the hearing. Griffitt does not desire reinstatement. He testified, and we find, that the job was

regular and equivalent to the work he had been doing for the respondent Mining Company. He did not obtain regular and substantially equivalent employment before that time.

Mack Hanks is claimed to have obtained regular and substantially equivalent employment on March 13, 1936, on June 20 and October 29, 1937. Prior to the strike he was employed by the respondent Mining Company and earned \$4.50 a day, 5 days a week. His average annual earnings since 1932 were \$699. Between March 1936 and June 1937, Hanks was employed by the Byrdhart Mining Company in the Tri-State area, working for about 300 days during this period at \$3 a day. This job ended when the mine was subleased. Between June 20 and September 11, 1937, he was employed at the Cagle Mining Company, earning a total of \$202. This job ended when "the mine went broke." Between October 29, 1937, and February 21, 1938, Hanks worked occasionally for the Little Six Mining Company, earning \$3.50 a day and a total of \$65.28. Hanks, who had worked with the respondent Mining Company for 8 years prior to the strike, testified that he obtained no subsequent employment from which he earned as much as he had been receiving from the respondent Mining Company. We find that Mack Hanks has not obtained regular or substantially equivalent employment.

Cecil Glenn Harreld is claimed to have obtained regular and substantially equivalent employment on August 10, 1935, and in October 1937. Between January 1 and May 8, 1935, Harreld earned \$309 from the respondent Mining Company, working 8 hours a day, 5 days a week, and getting \$3.55 a day and \$17.75 a week. From August 10, 1935, until January 10, 1936, he worked for the Continental Reclamation Company in Texas, earning \$4.50 a day and a total of \$390. Because of inclement weather, Harreld averaged only 17 days' work a month on this job and it ended when the reclamation was completed. Thereafter, Harreld was transferred to working as a watchman for the same Company, where he remained for 7 months, earning a total of \$416, or a little more than \$2 a day. This job ended when the Company became insolvent. In October 1937, Harreld worked for the Yellow Aster Mining Company, being employed 2 months and earning a total of \$125. This job ended when the Company went out of business. We find that Cecil Glenn Harreld has not obtained regular and substantially equivalent employment.

Alfred P. Hatfield is claimed to have obtained regular and substantially equivalent employment on September 5, 1937. His average annual earnings with the respondent Mining Company prior to the strike were \$610.80. At the time of the strike he was earning \$2.80 a day or \$14 a week for an 8-hour day, 5 days a week. On September 5, 1937, he began to work for the Kohl & Barr Mining Company at Waco,

Missouri, earning \$3.50 a day and working for 8 hours a day. He termed this as "just regular mining work." At the time of the hearing he was still employed at the Kohl & Barr Mining Company, having earned a total of \$424.50 since September 5, 1937. We find that on September 5, 1937, Alfred P. Hatfield obtained regular and substantially equivalent employment.

B. M. Headley is claimed to have obtained regular and substantially equivalent employment on June 1, 1936. His average annual earnings with the respondent Mining Company prior to the strike were \$257.40. On June 1, 1936, Headley obtained employment at the Kansas Milling Company in Wichita, Kansas, earning \$3.20 a day and working 6 days a week. On March 10, 1938, he was still employed by that Company, having earned a total of \$2,005.55. We find that on June 1, 1936, G. M. Headley obtained regular and substantially equivalent employment, but that he did not obtain such employment before that date.

Ralph Henderson is claimed to have obtained regular and substantially equivalent employment on January 15 and July 27, 1936. His average annual earnings while working for the respondent Mining Company were \$668.78, and prior to the strike he was working 8 hours a day and averaging \$21.40 a week. Beginning January 15, 1936, he obtained employment with the Dines Mining Company and worked for a total of 70 shifts, earning \$165.73. He was paid by the can at a lower rate than the respondent Mining Company had paid him. From July 27, 1936, until January 1, 1938, he worked for the Davis Big Chief Mine, being paid 11 to 15 cents a can. These cans, however, were much larger than the cans used by the respondent Mining Company. His total earnings at this job were \$1,426.61, an average somewhat higher than his average at the respondent Mining Company. He testified that he quit the Davis Big Chief Mine when the mine shut down. In its answer to the questionnaire, however, that Company stated that Henderson quit voluntarily because of illness. In view of the fact that Henderson had worked for the respondent Mining Company steadily from April 29, 1929, to May 8, 1935, and worked at the Davis Big Chief Mine for only 347 shifts, and in view of the fact that the working conditions were made somewhat more difficult by the size of the cans, we find that Ralph Henderson has not obtained regular and substantially equivalent employment.

James R. Hensley is claimed to have obtained regular and substantially equivalent employment on February 12, and on April 5, 1937. His average annual earnings from the respondent Mining Company prior to the strike were \$575, having averaged \$3.55 a shift. From February 12 until March 6, 1937, he worked with the

Canadian Mining & Development Company in the Tri-State area, earning \$4 a day and leaving when the mine shut down. On April 3, 1937, Hensley began to work for the Federal Mining & Smelting Company in the Tri-State area, and was still working for that Company on January 20, 1938, the date on which he testified. He began work at \$4.65 a shift, but these wages were reduced to \$3.40 a shift by December 1937. His total earnings with that Company were \$1,400. We find that on April 3, 1937, James R. Hensley obtained regular and substantially equivalent employment, but that he did not obtain such employment before that date.

Vivian Hiatt is claimed to have obtained regular and substantially equivalent employment sometime in 1936. His average annual earnings with the respondent Mining Company were \$639. At the time of the strike he averaged \$2.80 a day or \$14 a week. From April 10 to August 10, 1936, Hiatt worked for a construction company in New Mexico, earning \$3.50 a day and a total of \$460. This job was one lasting only for the duration of the particular construction work. Between April 29 and September 1, 1937, Hiatt obtained a similar construction job and earned \$720. Inasmuch as such employment was geographically remote from the Tri-State area, and inasmuch as these jobs were temporary by their very nature, we find that Vivian Hiatt has not obtained regular and substantially equivalent employment.

H. N. Hilburn is claimed to have obtained regular and substantially equivalent employment on August 14, 1935, and on May 19, 1936. Hilburn's average annual earnings from the respondent Mining Company were \$1,153. At the time of the strike he was earning \$42 a week for a 5-day week. He worked from August 14 until 21, 1935, at the Morning Mine in Mullen, Idaho, where he earned \$42.50. From May 19 until November 21, 1936, he worked at the Hecla Mine at Burke, Idaho, where he earned a total of approximately \$700. Hilburn testified that he left the latter job because he was "blacklisted"; officials of the Hecla Mine, answering the respondents' questionnaire, stated that he was "laid off to make room for man with family." We find that H. N. Hilburn has not obtained regular and substantially equivalent employment.

Paul Hollingsworth is claimed to have obtained regular and substantially equivalent employment on September 20, 1937. His average annual earnings while working for the respondent Mining Company were \$263, and at the time of the strike he was earning \$2.50 a day. While working for the respondent Mining Company he worked at the Galena smelter. From September 20 until November 14, 1937, Hollingsworth worked as a shoveler at the Waco Mine in Missouri, where he earned \$4 a day. He quit this job because he

did not like working in a mine and "got afraid of the ground." Although this job netted Hollingsworth a higher salary than that which he earned with the respondent Mining Company, in view of the fact that the respondent Mining Company's job did not involve working in a mine, we find that Paul Hollingsworth did not obtain regular and substantially equivalent employment.

Cleve Horner is claimed to have obtained regular and substantially equivalent employment on June 20, 1936. His average annual earnings with the respondent Mining Company were \$577.80, and at the time of the strike he received \$3.25 a day for an 8-hour day, working 5 days a week. His average weekly salary was \$16.25. On June 20, 1936, he began to work for the Ore Development Company in the Tri-State area. He worked for this Company and its successors until February 10, 1938, averaging \$49 a month. His total earnings from these Companies were \$1,500. His average earnings were \$3.50 a day, but he was required to work 12 hours a day, 7 days a week. This job ended when the Company went out of business. In answer to the respondents' questionnaire, the manager of the Ore Development Company stated that Horner had been "employed more or less steadily though not always at full time." We find that Cleve Horner has not obtained regular and substantially equivalent employment.

J. D. Hughes was reinstated by the respondent Mining Company on November 14, 1935, in a job similar to that which he filled prior to the strike. We find that on November 14, 1935, J. D. Hughes obtained regular and substantially equivalent employment.

Harry Franklin James is claimed to have obtained regular and substantially equivalent employment on July 16, 1937. His average annual earnings with the respondent Mining Company were \$417. At the time of the strike he was working as a machineman, earning \$3.55 a day and \$17.75 a week. On July 16, 1937, James went to Burke, Idaho, and worked for the Sullivan Mining Company until November 24, 1937. He earned about \$700 with that Company and quit to return to the Tri-State area, where his wife and children lived. We find that Harry Franklin James has not obtained regular and substantially equivalent employment.

J. L. Jones is claimed to have obtained regular and substantially equivalent employment on September 4, 1935, on November 10, 1936, on August 2, 1937, and on March 25, 1937. His average annual earnings with the respondent Mining Company were \$665.50. At the time of the strike he earned \$4.75 a day and \$24 a week for an 8-hour day, 5-day week. From September 4, 1935, until March 10, 1936, he worked for the New Mont Mining Company at Grass Valley, California. He was paid \$4.80 a day and earned a total of \$1,014.73. He

left this job when he was notified by his family that he was wanted at his home in the Tri-State area. Thereafter, he returned to California and worked for the Walker Mining Company, Walker, California, from November 10, 1936, to February 9, 1937, and from March 1 to 19, 1937. His total earnings for this Company were \$471.43. This job ended when Jones was injured and had to go to a hospital. He was unable to obtain employment with the Company when he was discharged from the hospital. Jones then worked for 8 days for the Morning Mine in Mullen, Idaho, earning \$34.50. He left this job because he was unable to "stand the work there because there was no ventilation." From March 25 until June 12, 1937, he worked for the Expiration Copper Company in Miami, Arizona, earning \$395. He left this job because his mother was ill and he had to return to the Tri-State area to see her. In view of the difficulties engendered by geographical remoteness of the jobs which Jones obtained, we find that he did not obtain substantially equivalent employment.

Burton (Ben) Kearney is claimed to have obtained regular and substantially equivalent employment on April 17, on August 1, 1936, and on June 20, 1937. Between January 1 and May 8, 1935, Kearney earned \$216.60 from the respondent Mining Company. He worked 8 hours a day, 5 days a week and averaged \$2.80 a day or \$14 a week. In 1936 he worked for a mining company in New Mexico and earned \$70. This job ended when the "vein played out." Between August and September 1936 he worked as a driller in California, earning a total of \$168. Because of illness he left this job and returned to Picher. Between June 20 and November 24, 1937, Kearney worked for a gouging mine and earned a total of \$390. This job ended when the vein played out. The evidence shows that gouging mines by their very nature offer impermanent employment. We find that Burton Kearney has not obtained regular and substantially equivalent employment.

Earl Kohl is claimed to have obtained regular and substantially equivalent employment on July 10, 1936. His average annual earnings with the respondent Mining Company were \$652.23. At the time of the strike he worked 8 hours a day, 6 days a week, and received \$3.80 a day and \$22.80 a week. Kohl found employment in California on July 10, 1936, and worked for a private individual, earning \$3 a day, averaging about 3 days' work per week. This job lasted until the date of the hearing and Kohl had earned \$675. In view of the disparity in wages and the type of employer, as well as geographical considerations, we find that Earl Kohl has not obtained regular and substantially equivalent employment.

Darrell Largent is claimed to have obtained regular and substantially equivalent employment in August 1937. His average annual

earnings with the respondent Mining Company were \$760. At the time of the strike he was getting \$3.80 a day. On August 1, 1937, he obtained a job at the Port of Entry in Kansas, in charge of trucks entering that State. His monthly salary was \$125 at this job, and he was still working there at the time of the hearing. He does not desire reinstatement. We find that Darrell Largent obtained regular and substantially equivalent employment on August 1, 1937, but that he did not obtain such employment before that date.

John McCormick is claimed to have obtained regular and substantially equivalent employment in December 1936. His average annual earnings with the respondent Mining Company were \$531.18. In December 1936, he entered business for himself at Ardmore, Oklahoma, engaging in auto-salvage work, from which he earned a net profit of approximately \$10 a week and a total of \$560. His weekly wage with the respondent Mining Company at the time of the strike was \$17.50, working 40 hours a week. He desires reinstatement. In view of the different nature of his work, and his lower earnings, we find that John McCormick has not obtained substantially equivalent employment.

Charles McIntire is claimed to have obtained regular and substantially equivalent employment in August 1936. His average annual earnings with the respondent Mining Company were \$626. At the time of the strike he was earning \$3.05 a day for six 6-hour shifts a week. In August 1936 he obtained a job with the Roberts Market in Venice, California, where he averaged \$10 or \$12 a week and earned a total of approximately \$1,365. In view of geographical considerations and the different nature of his subsequent job, we find that Charles McIntire has not obtained substantially equivalent employment.

Fred McIntire is claimed to have obtained regular and substantially equivalent employment in September 1936. His average annual earnings with the respondent Mining Company were \$1,007.60. At the time of the strike he was working as a mechanic, receiving \$3.80 a day, 8 hours a day and 5 days a week. From September 1, 1936, until the time of the hearing, McIntire did landscaping work for the Hafold Lloyd Estate in Beverly Hills, California, where he received \$4 a day for a 6-day week. He was employed by the Harold Lloyd Estate "until completion of the job," which was to occur a few days after McIntire testified. In view of the temporary nature of the job, in view of the geographical considerations, and in view of the different type of work from that which he had been doing for the respondent Mining Company, we find that Fred McIntire has not obtained substantially equivalent employment.

James McIntire is claimed to have obtained regular and substantially equivalent employment on January 8, 1936. His average an-

nual earnings with the respondent Mining Company were \$754, and at the time of the strike his wages varied from \$2.80 to \$3.55 a day for a 5-day week. Beginning January 8, 1936, he worked as a watchman in Los Angeles, California, earning \$100 a month. However, he was required to work 12 hours a day and 7 days a week, and at this job he obtained no time off. He stated that he desired reinstatement. We find that James McIntire has not obtained regular and substantially equivalent employment.

Milton McIntire is claimed to have obtained regular and substantially equivalent employment on August 16, in October 1935, and on May 15, 1937. His average annual earnings with the respondent Mining Company were \$782.73. At the time of the strike he was working as a tractor driver and his wages varied from \$3.80 to \$4.05 a day, working 8 hours a day and 5 days a week. From August 6 until September 30, 1935, he worked as a common laborer for the Silica Sand Company at Brentwood, California, earning a total of \$147.99. This job was stated by the Silica Sand Company to have been temporarily terminated because of lack of work. From October 16 until November 20, 1935, McIntire worked as a laborer for the American Smelting & Refining Company at Selby, California, earning a total of \$109.95. He was discharged from this job. From May 19, 1937, until February 28, 1938, McIntire worked for the West Construction Company at Monrovia, California, and earned a total of \$1,044.80. This job was to last only until the particular construction work was completed, and McIntire was hired on such understanding. He testified, and we find, that at the time of the hearing the project would be completed within 6 weeks. We find that Milton McIntire has not obtained substantially equivalent employment.

Ray McIntire is claimed to have obtained regular and substantially equivalent employment on August 20, 1935. His average annual earnings with the respondent Mining Company were \$560. At the time of the strike he was earning \$3.30 or \$4.05 a day, averaging \$21.30 a week for a 6-day week. From August 20, 1935, until a few days before the hearing, he obtained a job as a gardener on the Harold Lloyd Estate, earning \$4 a day and \$24 a week. This job was to last only until the particular work was done, and it had terminated shortly before McIntire testified. He stated that he desired reinstatement. We find that Ray McIntire has not obtained substantially equivalent employment.

Kenneth McNutt is claimed to have obtained regular and substantially equivalent employment in January 1937. He had worked for the respondent Mining Company for 5 weeks prior to the strike, earning \$66.32, and at the time of the strike he was earning \$2.75 a shift for six shifts a week. He testified, and we find, that he was

working by the day for the respondent Mining Company and that he was "doing more or less extra work." From January until November 1937, McNutt worked for the Herndon Drilling Company in Kansas, earning \$7 a day and a total of \$650. He testified that during this period there were some weeks when he did not work for the Herndon Drilling Company at all, since his job was casting work—that is, drilling holes through which to run pipes. Each time McNutt finished drilling one hole he would lay off until the Company had another hole to drill. In view, however, of the nature of McNutt's prior employment with the respondent Mining Company, we find that in January 1937 he obtained regular and substantially equivalent employment, but that he did not obtain such employment before that date.

Ray Mayfield is claimed to have obtained regular and substantially equivalent employment on December 18, 1936, on January 14 and on September 15, 1937. In 1934, Mayfield earned \$618 from the respondent Mining Company, and for 19 weeks in 1935 he earned \$270. At the time of the strike he was receiving \$3.25 a day for 5 days a week. From December 18, 1936, until July 14, 1937, he was employed at the Blue Mound Mining Company in the Tri-State area, where he worked 8 hours a day and 6 days a week and earned a total of \$479. At his job he was engaged sometimes as a shoveler and sometimes as a mule driver. He quit this job because of the difficulty of the work, since he was required to drive a mule, to pull an incline hoist, and to do other jobs. From September 15 until December 20, 1937, Mayfield was employed by the Y. W. Mining Company in the Tri-State area, earning \$3 a day and a total of \$151. This job ended when the mine shut down. We find that Ray Mayfield has not obtained regular and substantially equivalent employment.

George Messer is claimed to have obtained regular and substantially equivalent employment on February 4, on March 4, on April 10, and on October 4, 1937. His average annual earnings with the respondent Mining Company were \$876. At the time of the strike he was earning \$4.05 a day working 5 days a week. From February 4 to 27, 1937, he worked for the Canadian Mining & Development Company in the Tri-State area, earning \$3.30 a day and a total of \$74.38. This Company operated only one mine and the job ended when the mine shut down. From March 4 to April 2, 1937, he worked for an individual and earned a total of \$94. He quit this job when he had a chance to obtain better employment. From April 10 until September 5, 1937, Messer worked as a mill foreman for the Lead & Zinc Producers Company in the Tri-State area, earning \$5 a day and a total of \$550. This job ended when the Company

became insolvent. On October 4, 1937, Messer obtained a job at the Famous Mining Company in the Tri-State area, earning \$30 a week. He was still employed by the Famous Mining Company at the time of the hearing, having earned a total of \$434.81. We find that on October 4, 1937, George Messer obtained regular and substantially equivalent employment, but that he did not receive such employment before that date.

William Moore is claimed to have obtained regular and substantially equivalent employment on March 13, 1936. His average annual earnings with the respondent Mining Company were \$664.50. At the time of the strike he averaged \$4.50 a day and \$22.50 a week. From March 13, 1936, until September 11, 1937, he worked at the Byrdhart Mining Company and its successor, in the Tri-State area, earning a total of approximately \$1,000. This job ended when the Company became insolvent. We find that William Moore has not obtained substantially equivalent employment.

Jess Murray is claimed to have obtained regular and substantially equivalent employment on December 1, 1935. His average annual earnings with the respondent Mining Company were \$650. At the time of the strike he was earning \$3.20 a day. The respondents claim that Murray obtained employment with the Canadian Mining & Development Company on December 1, 1935, and submitted in evidence checks made by that Company to one J. Murray. Murray denied that he ever worked for the Canadian Mining & Development Company at all or that he had ever received the checks. We find that Jess Murray was not employed by the Canadian Mining & Development Company and that he has not obtained regular and substantially equivalent employment.

Charles Newman is claimed to have obtained regular and substantially equivalent employment on August 4 and on October 12, 1937. His average annual earnings with the respondent Mining Company were \$485.85. At the time of the strike he was earning \$3.55 a day, working on a drilling machine. From August 4 until September 29, 1937, he was employed as a shoveler by the Y. W. Mining Company in the Tri-State area, and earned a total of \$117.04. He testified that he regarded shoveling as more dangerous than machine work because of the increased dust hazard. From October 12 to November 27, 1937, Newman was employed at the Federal Mining & Smelting Company in the Tri-State area, and earned a total of \$146.02. We find that Charles Newman has not obtained regular and substantially equivalent employment.

W. C. Novak is claimed to have obtained regular and substantially equivalent employment on February 28, 1936, on June 20, on December 10, 1937, and on January 5, 1938. His average annual earnings

with the respondent Mining Company were \$867. At the time of the strike he earned approximately \$4.50 a day working 5 days a week. From February 28, 1936, to June 20, 1937, Novak worked for a gouging mine, earning \$3 a day. This job ended when the mine was subleased. From June 20 until September 11, 1937, he worked for the sublessee of this mine. His daily wage was \$4, which would have totalled \$336.40, but the Company became insolvent and he received only \$278.54. From December 10 until 15, 1937, he worked for the Federal Mining & Smelting Company and earned \$29.15. This job ended when the mine shut down. The mine reopened on January 5, 1938, and he was reemployed. His daily wage varied, since he was working as a utility man, and up to the time of the hearing he had earned \$118. We find that W. C. Novak has not obtained regular and substantially equivalent employment.

Eugene Overstreet is claimed to have obtained regular and substantially equivalent employment in April 1937 and on September 5, 1937. In 1934 he earned \$570, and between January 1 and May 8, 1935, he earned \$234 with the respondent Mining Company. At the time of the strike he was earning \$4.75 a shift, working five shifts a week. From April 5 to July 31, 1937, he was employed by the Lead & Zinc Producers Company in Missouri, earning \$3.25 a day and a total of \$230. This job ended when the Company curtailed its operations. From September 5, 1937, until January 8, 1938, Overstreet was employed as a shoveler at the N. C. Mining Company in the Tri-State area, earning \$4 a day. This job ended when the mine shut down. We find that Eugene Overstreet has not obtained regular and substantially equivalent employment.

James B. Parrish is claimed to have obtained regular and substantially equivalent employment on August 3, 1936, and on June 19, 1937. His average annual earnings with the respondent Mining Company were \$305.40, but between January 1 and May 8, 1935, he earned \$292 with the respondent Mining Company. At the time of the strike he was earning \$4.50 a day and averaging \$25 a week. From August 3, 1936, to February 8, 1937, he was employed at a mine in New Mexico, where he earned 48 cents an hour and a total of approximately \$500. This job ended when the mine closed down. From June 19 to September 22, 1937, Parrish worked for the Tennessee Mining Company at Chloride, Arizona, where he earned \$4.50 a day and a total of approximately \$400. He testified that the disadvantages of his second job were that he was assigned to work in a "gassy drift" and that the mine was very far from his home in the Tri-State area. We find that James B. Parrish has not obtained regular and substantially equivalent employment.

Newton J. Pettitt is claimed to have obtained regular and substantially equivalent employment on September 11, 1937. His average annual earnings with the respondent Mining Company were \$443.65. At the time of the strike he was earning \$3.05 a day and \$14.15 a week, working 8 hours a day and 5 days a week. From September 9 to November 29, 1937, he worked for Jake Dryer, who operated a small gouging mine. His daily wage varied between \$2.50 and \$3, and his total earnings were \$174. This mine was a small one, operated by an individual. We find that Newton J. Pettitt has not obtained regular and substantially equivalent employment.

Fred M. Pickett is claimed to have obtained regular and substantially equivalent employment on July 6, 1936, and on September 9, 1937. His average annual earnings with the respondent Mining Company were \$558.22. At the time of the strike he was earning \$2.75 a day for an 8-hour day, working at the Central Mill. Since the strike he has not been employed by any mill. From July 5 until September 5, 1936, he was employed by the Empire District Electric Company, earning \$20 a week. From September 9, 1937, until the time of the hearing, he was employed as a lineman by the Southwest Missouri Railroad in the Tri-State area, earning \$100 a month. On this job Pickett was subject to call. Although Pickett testified that his work with the Southwest Missouri Railroad might not be permanent and that he desired reinstatement, in view of the fact that he was still employed by that Company at the time of the hearing, and in view of the substantially higher wages which he was earning, we find that on September 9, 1937, Fred M. Pickett obtained regular and substantially equivalent employment, but that he did not obtain such employment before that date.

Albert O. Plummer is claimed to have obtained regular and substantially equivalent employment on January 10 and on March 1, 1937. Plummer was an extra when employed by the respondent Mining Company and prior to the strike worked only 1 week, earning approximately \$13. His average daily wage was \$3. From January 10 until February 25, 1937, Plummer worked for the Mid-Continent Lead & Zinc Company in the Tri-State area, earning a daily wage of \$3.86 and a total of \$57.89. On March 1, 1937, Plummer was reinstated by the respondent Mining Company at a daily wage of \$3.91. In view of the nature of Plummer's prior employment with respondent Mining Company, we find that on January 10, 1937, he obtained regular and substantially equivalent employment, but that he did not obtain such employment before that date.

George D. Pruitt is claimed to have obtained regular and substantially equivalent employment on October 14, 1936. Between

December 17, 1934, and May 8, 1935, he earned \$295.40 with the respondent Mining Company. At the time of the strike he was earning \$3.80 a day and averaging \$19.40 a week. From October 14 until December 11, 1936, Pruitt was employed by the Golden Queen Mining Company at Mojave, California, where he earned \$4.25 a day and a total of \$208.62. Pruitt testified that this job was as good as the one he had with the respondent Mining Company and that it ended when the entire crew was laid off. While working in California, Pruitt's family remained in the Tri-State area. He was therefore compelled to live in a tent and seek his own board. We find that George D. Pruitt has not obtained regular and substantially equivalent employment.

Robert M. Ransom is claimed to have obtained regular and substantially equivalent employment on March 12, on July 6, 1937, and on January 17, 1938. His average annual earnings with the respondent Mining Company were \$498.02. At the time of the strike he was earning \$3 a day, working 8 hours a day and 6 days a week. From March 12 to June 25, 1937, he was employed at the Johnny Hicks Mine, but this employment ended when the mine shut down. On July 6, 1937, he began working for the Federal Mining & Smelting Company and was still employed by that Company at the time of the hearing, having earned a total of approximately \$800. He testified that he was satisfied with his work at the Federal Mining & Smelting Company, and that he did not desire reinstatement. We find that on July 6, 1937, Robert M. Ransom obtained regular and substantially equivalent employment, but that he did not obtain such employment before then.

James R. Rhodes is claimed to have obtained regular and substantially equivalent employment on November 12, 1935, and on June 1, 1936. His average annual earnings with the respondent Mining Company were \$368.30. At the time of the strike he was earning \$2.80 a day. From November 12, 1935, until April 18, 1936, Rhodes was employed by the American Smelting & Refining Company at Selby, California, earning \$21.40 a week, or a total of \$436.84. Although he left his wife and two children in the Tri-State area when he first went out to California, he subsequently brought them to that State. Rhodes left this Company because the work had been curtailed and there was a threat that the job would become only part time. From June 1 to September 1, 1936, he worked for the Columbia Steel Company at Pittsburg, California, earning \$23.04 a week. He then returned to the Tri-State area with his family. In view of the hardship imposed upon Rhodes by reason of geographical considerations in his employment, we find that he has not obtained regular and substantially equivalent employment.

Alfred Lewis Rice is claimed to have obtained regular and substantially equivalent employment on March 1, 1936. His average annual earnings with the respondent Mining Company were \$789. At the time of the strike he was earning \$4.55 a shift and \$22.75 a week. From March 1 to August 1, 1936, he worked for the Berg Iron & Metal Company in Los Angeles, California, earning \$4 a day. He resumed work for the Company sometime in November and remained in its employment until February 3, 1938, earning \$5 a day. He resigned from the Berg Iron & Metal Company because he was anxious to return to the Tri-State area. In view of the geographical considerations involved, we find that Alfred Lewis Rice has not obtained regular and substantially equivalent employment.

Clarence Rice is claimed to have obtained regular and substantially equivalent employment in October 1935. His average annual earnings with the respondent Mining Company were \$749.50. At the time of the strike he was engaged as a tractor driver, earning \$3.30 a day and working 6 days a week. In October 1935, Rice began to work for the Smither Tree Company in Los Angeles, California, as a common laborer. He was employed as a temporary worker; his daily hours were irregular; and he worked for this Company on and off up to the time of the hearing. We find that Clarence Rice has not obtained regular and substantially equivalent employment.

Harry L. Rice is claimed to have obtained regular and substantially equivalent employment in March, September, and November 1936. His average annual earnings with the respondent Mining Company were \$865.80. At the time of the strike he was earning \$4.55 for an 8-hour shift, 5 days a week. From March 26 until September 10, 1936, Rice was employed by the Berg Metals Corporation, Los Angeles, California, where he earned 50 cents an hour. His hours of work with this Company varied from 8 to 16 a day. The work was irregular, since at times it was very slack and at other times he was forced to work two shifts a day. From September 14 to November 19, 1936, Rice was employed by Peck & Wadsworth, a tree company in Los Angeles, California, where he earned 40 cents an hour and a total of \$197.70. The hours per day at this job were uncertain. From November 20, 1936, to November 5, 1937, Rice was employed by the West Construction Company at Monrovia, California, where he earned \$4.80 to \$5.20 a day. The work for this Company consisted of building a tunnel. It was somewhat irregular, since the practice was for Rice to work for 2 or 3 months at a time and then lay off for a month. Rice has a wife and three children. He was a foreman with the respondent Mining Company prior to the strike. We find that Harry L. Rice has not obtained regular and substantially equivalent employment.

Harry Elmer Ridgway is claimed to have obtained regular and substantially equivalent employment on October 14, 1936. His average annual earnings with the respondent Mining Company were \$468. At the time of the strike he was averaging \$4 a day, working 5 days a week. On October 14, 1936, Ridgway was employed by the Mid-Continent Lead & Zinc Company in the Tri-State area. His average daily wage was \$4.70 and his total earnings for that Company were \$1,611. He was still employed by that Company on the date on which he testified. We find that on October 14, 1936, Harry Elmer Ridgway obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Lawrence Riley is claimed to have obtained regular and substantially equivalent employment on April 29, 1936. Between July 21, 1934, and May 8, 1935, Riley earned \$600.00 with the respondent Lead Company. At the time of the strike he worked 5 days a week, 8 hours a day and earned \$3.20 a day. On April 29, 1936, he obtained employment with the Meeker Advertising Company in the Tri-State area and was still employed by it at the time of the hearing. With this Company Riley worked $5\frac{1}{4}$ days a week and averaged \$2 a day. His total earnings were \$1,453, and he testified that his work was "somewhat unsteady." In view of the disparity in wages earned and in the nature of work done, we find that Lawrence Riley has not obtained regular and substantially equivalent employment.

Joshua Roberts is claimed to have obtained regular and substantially equivalent employment on August 3, 1937. His average annual earnings with the respondent Lead Company were \$459.90. In 1934 he earned \$711, and between January 1 and May 8, 1935, he earned \$322. At the time of the strike he averaged \$21 a week. On August 3, 1937, he obtained employment as a truck driver and laborer at the Western Iron & Foundry Company, at Wichita, Kansas, where his average daily wage was \$3.20, and where he earned a total of \$582.90. He was still employed by that Company at the time of the hearing. We find that on August 3, 1937, Joshua Roberts obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Clifford L. Roy is claimed to have obtained regular and substantially equivalent employment on June 9, 1936, with the Sunshine Mining Company. At the hearing, counsel for the Board conceded that such employment was obtained and the evidence shows that such employment was regular and substantially equivalent. We find that on June 9, 1936, Clifford L. Roy obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Ted Schasteen is claimed to have obtained regular and substantially equivalent employment on September 10, 1937. His average annual earnings with the respondent Mining Company were \$326.44. Between January 1 and May 8, 1935, he earned \$134 with the respondent Mining Company. At the time of the strike he was earning \$3.80 a day, working 5 days a week and 8 hours a day. From September 10 to 24, 1937, he obtained employment with the Utah Construction Company, Bingham Canyon, Utah. His daily wage varied between \$4.30 and \$5.65. This work was merely temporary and Schasteen was employed by the Company only when the occasion demanded. In view of the actual length of his employment with this Company, and in view of geographical considerations, we find that Ted Schasteen has not obtained regular and substantially equivalent employment.

Raymond Spurlock worked irregularly for the respondent Mining Company, having been employed in January 1935 for 8 days, in February for 1 day, in April for 1 day, and in May for 1 day. His total earnings in 1935 with the respondent Mining Company were \$39.93. From September 1 to November 5, 1936, he was employed by the Evergreen Cemetery, in Los Angeles, California, being engaged in pick and shovel work. There he earned \$3.20 a day and a total of \$149. This job was temporary and Spurlock was so told at the time he was hired. From November 6, 1936, until January 27, 1937, Spurlock was employed by the Berg Metals Corporation in Los Angeles, California, earning \$3.20 a day and a total of \$100. With this Company Spurlock worked only 1 or 2 days a week. From January 27 until April 21, 1937, Spurlock was employed by the Forest Lawn Cemetery, working 6 days a week at \$3.60 a day, receiving a total of \$244. This job was regular while it lasted. From July 21 until October 21, 1937, Spurlock was employed at the Atolia Mining Company, in Atolia, California, earning \$4 a day and a total of \$360. In view of Spurlock's irregular employment with the respondent Mining Company, we find that he obtained regular and substantially equivalent employment on September 1, 1936, and that he did not obtain such employment before that date.

Lee Stancoff is claimed to have received regular and substantially equivalent employment on November 20, 1935. His average annual earnings with the respondent Mining Company were \$1,294.50. He was working as an electrician earning \$4.50 a day and a weekly average of \$27. He worked 7 hours a day and 6 days a week at the time of the strike. On November 20, 1935, he obtained employment with the Service Electric Company at Picher, Oklahoma, where he earned 75 cents an hour, working 42 hours a week. His total earnings with that Company up to the time of the hearing were \$3,300.

and he was still employed by that Company at the time he testified. We find that on November 20, 1935, Lee Stancoff obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Fay F. Stone is claimed to have received regular and substantially equivalent employment on March 28, 1937. His average annual earnings with the respondent Mining Company were \$372, but between January 1 and May 8, 1935, he earned \$270. At the time of the strike he worked 8 hours a day and 6 days a week and earned \$3.85 a day. From March 28 until November 2, 1937, he was employed by the Inspiration Copper Company, Inspiration, Arizona. His average wages per shift at this Company were \$5.50, and his total wages were \$644.19. He admitted that this job was steady and that it ended when he sustained an injury. We have already held that this injury had disqualified Stone from further work with the respondents. We find that on March 28, 1937, Fay F. Stone obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Ernest Tennis is claimed to have obtained regular and substantially equivalent employment on an unspecified date. He had been employed by the respondent Mining Company as a carpenter and his average annual earnings were \$888.39. At the time of the strike he was earning \$3.55 a shift and averaging five shifts a week. Beginning March 1, 1937, after having worked on W. P. A., Tennis resumed carpentry work, obtained various jobs. Thus, he earned \$210 building a mill; then worked for a month and a half and earned \$241.50 at another construction job; thereafter obtained other carpentry jobs. He testified that he acted as a journeyman carpenter and was working for himself at whatever jobs he could find. In view of the nature of such employment, we find that Ernest Tennis has not obtained regular and substantially equivalent employment.

James C. Thompson is claimed to have obtained regular and substantially equivalent employment on February 9, 1936, and on several dates thereafter. His average annual earnings with the respondent Mining Company were \$159 and his work was irregular. At the time of the strike he was earning \$2.80 a day and averaging \$14 a week. Beginning on February 9, 1936, Thompson was employed at the Dines Mining Company in the Tri-State area. At this job he earned \$3.25 a day for an 8-hour day, working 6 days a week. This job ended when Thompson sustained an injury, which we have already held rendered him unable to work for the respondent Mining Company. We find that James C. Thompson obtained regular and substantially equivalent employment on February 9, 1936, and that he did not obtain such employment before that date.

C. E. Van Kirk is claimed to have obtained regular and substantially equivalent employment on June 20, on July 23, 1937, and on January 3, 1938. His average annual earnings with the respondent Mining Company were \$426.60. Between January 1 and May 8, 1935, he earned \$199 with the respondent Mining Company and was getting \$2.80 a day at the time of the strike. Between June 20 and September 11, 1937, he was employed at the Cagle Mining Company in the Tri-State area. His work for this Company was irregular and during the entire period he earned only \$53.54. This job ended when the Company became insolvent and shut down. He worked for 5 days for Kansas Explorations, Inc., and earned \$17.01. He claimed that he was discharged from this job, which was in the Tri-State area, because of his failure to obtain a blue card. From January 3 to February 21, 1938, Van Kirk obtained occasional employment from the Little Six Mining Company, but his total earnings were only \$19.68, according to the Company, and \$51, according to Van Kirk. In view of the actual length of subsequent employment obtained by him, we find that C. E. Van Kirk has not obtained regular and substantially equivalent employment.

Earl Vinson is claimed to have obtained regular and substantially equivalent employment in March 1936. His average annual earnings with the respondent Lead Company were \$902.16. On April 13, 1936, he obtained employment with the Red River Lumber Company, in Westwood, California, earning \$4.20 a day. He left this job on November 24, 1936, because of the high altitude, which caused ill health both to himself and to his wife. His wife's resulting high blood pressure necessitated their departure, and Vinson returned to the Tri-State area. We find that Earl Vinson has not obtained regular and substantially equivalent employment.

Clarence Walker is claimed to have received regular and substantially equivalent employment on May 15, 1936. On this date Walker obtained employment which he conceded was regular and substantially equivalent, and he stated that he did not desire reinstatement. We find that on May 15, 1936, Clarence Walker obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Charles E. Ward is claimed to have obtained regular and substantially equivalent employment on January 1, 1936. His average annual earnings with the respondent Mining Company were \$737. At the time of the strike he was working at the Central Mill and earning \$3.25 a day. He worked five shifts a week and 8 hours each shift. Since January 1, 1936, he had been employed at the Cantrell Garage in the Tri-State area, earning \$12 a week for the first 18 months and \$15 a week thereafter. He worked 12-hour shifts and 7 days a week.

We find that Charles E. Ward has not obtained regular and substantially equivalent employment.

Byron Warmack is claimed to have obtained regular and substantially equivalent employment on September 24, 1936. His average annual earnings with the respondent Mining Company were \$528.50. At the time of the strike he was earning \$2.75 a day for 3 days a week and \$3.25 a day for 2 days a week. On June 24, 1936, he obtained employment with the Braeckel Sash & Door Company in Joplin, Missouri, where he earned \$14.40 a week. He was still employed with this Company at the time of the hearing, but had not worked for it between January 21 and July 16, 1937. During that interim period, however, he had worked for a similar company at a similar salary. In view of the length of his said employment, we find that Byron Warmack obtained regular and substantially equivalent employment on September 24, 1936, and that he did not obtain such employment before that date.

Lawrence Webster is claimed to have obtained regular and substantially equivalent employment on July 14, 1937. His average annual earnings with the respondent Mining Company were \$460.65. Between January 1 and May 8, 1935, he earned \$384, working at the respondent Mining Company's Central Mill. He was averaging \$13.75 a week, working 5 days a week, at the time of the strike. Beginning July 14, 1937, Webster was employed by the Kansas Milling Company at Wichita, Kansas, as a flour trucker. He earned 47½ cents an hour from the Kansas Milling Company, working from 6 to 8 hours per day. We find that on July 14, 1937, Lawrence Webster obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Ora Williams is claimed to have obtained regular and substantially equivalent employment in January and in September 1936. His average annual earnings with the respondent Mining Company were \$794.11. At the time of the strike he was earning \$3.55 a day, working 6 days a week. In January 1936 he obtained employment with the Dines Mining Company in the Tri-State area. He worked for this Company for approximately 3 months and left because he was required to obtain a blue card and because he was working on a night shift which was discontinued. While working for the Dines Mining Company, Williams earned \$3.25 a day, working 7 days a week. In September 1936, Williams opened his own cafe. During the entire period he obtained only about \$30 net profit from his cafe. He worked at the cafe from 6 a.m. to 10 p.m. each day. At the time of the hearing he was attempting to sell his cafe, and he desired reinstatement with the respondent Mining Company. We find that Ora Williams has not obtained regular and substantially equivalent employment.

Raymond Williams is claimed to have obtained regular and substantially equivalent employment in February 1936. His total earnings from the respondent Mining Company in 1933, 1934, and 1935 were only \$321.72. However, between January 1 and May 8, 1935, he earned \$250 with the respondent Mining Company. At the time of the strike he was earning \$2.80 a day. From February 5, 1936, to October 9, 1937, Williams worked for the Kansas State Telephone Company as a repair lineman, earning \$2.50 a day and receiving a total of \$1,350. In view of the irregular character of Williams' employment with the respondent Mining Company, we hold that on February 9, 1936, Raymond Williams obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

Elmer Lonnie Wood is claimed to have obtained regular and substantially equivalent employment on March 16, in June 1936, and in April 1937. His average annual earnings with the respondent Mining Company were \$596. At the time of the strike he was earning \$2.75 a shift. From March 16 until May 25, 1936, he was employed by the Britt Milling Company in the Tri-State area, and earned a total of \$172.50 or \$2.50 a day. He quit this job when he refused to obtain a blue card. From June 15 until December 15, 1936, he was employed by the Ore Development Company in the Tri-State area, but actually worked only 90 days during that entire period, earning \$3 a day. From April 9 to July 31, 1937, Wood was employed by the American Zinc Company, earning \$4.25 a day. He left this job "to obtain a better job" with the Sunflower Mining Company, where he earned \$4.75 a day. He worked for this latter Company until August 9, when he was operated upon. His illness thereafter prevented him from working. In view of these circumstances, we find that on April 9, 1937, Elmer Lonnie Wood obtained regular and substantially equivalent employment, and that he did not obtain such employment before that date.

T. D. Wood is claimed to have obtained regular and substantially equivalent employment on December 16, 1935. His average annual earnings with the respondent Mining Company were \$382.30. At the time of the strike he was earning \$3.25 a day. On December 16, 1935, he obtained employment with the Boriama Mining Company, at Yucca, Arizona, where he worked as an extra for 8 days, earning \$4.50 a day. Thereafter he worked for that Company until January 24, 1936, as a roustabout, doing odd jobs. This ended when he was laid off because of curtailment of operations. In view of the actual length of this employment, its varying nature, and its remoteness from the Tri-State area, we find that T. D. Wood has not obtained regular and substantially equivalent employment.

Glenn Woods is claimed to have obtained regular and substantially equivalent employment on February 26, 1937. His average annual earnings with the respondent Mining Company were \$446.28. At the time of the strike he was earning \$3.55 a day, working 5 days a week. From February 26 until April 9, 1937, he was employed by the Cherokee Mine in the Tri-State area, earning \$3.50 or \$4 a day. His total earnings with this Company were \$130.38. The Cherokee Mine, in answer to the respondents' questionnaire, assigned as Woods' reason for leaving the fact that the crew was cut. Woods testified that he was discharged because he had failed to obtain a blue card. At this job, he worked 6 and 7 days a week. In view of the actual length of his employment with this Company, we find that Glenn Woods has not obtained regular and substantially equivalent employment.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111; Tri-State Mine, Mill & Smelter Workers' Union; and the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, are labor organizations within the meaning of Section 2 (5) of the Act.

2. The strike begun on May 8, 1935, and continuing thereafter, was a current labor dispute on July 5, 1935, within the meaning of Sections 2(3) and (9) of the Act.

3. Persons who struck on May 8, 1935, and continued on strike on and after July 5, 1935, were employees of the respondents on July 5, 1935, within the meaning of Section 2 (3) of the Act.

4. John R. Sheppard is an employee within the meaning of Section 2 (3) of the Act.

5. By forming and establishing and thereafter assisting and supporting financially and otherwise, the Tri-State Union, and by managing, controlling and otherwise participating in the administration of that Union, the respondents, and each of them, have interfered with, restrained, and coerced their employees in the exercise of rights guaranteed by Section 7 of the Act and have thereby engaged in unfair labor practices within the meaning of Section 8 (1) of the Act.

6. By failing at any time to disassociate themselves and disestablish the Tri-State Union; by participating through their agents and supervisory employees, in the metamorphosis of the Tri-State Union into the Blue Card Union; by failing to disassociate themselves from the Blue Card Union; and by participating in the administration of and supporting the Blue Card Union, the respondents, and each of them, have interfered with, restrained, and coerced their employees

in the exercise of the rights guaranteed in Section 7 of the Act and have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

7. By employing, exercising, authorizing, and encouraging violence against the members and property of the International Union with intent to frustrate and nullify any efforts on the part of their employees to organize, the respondents, and each of them, have interfered with, restrained, and coerced their employees in their exercise of the rights guaranteed by Section 7 of the Act and have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

8. By otherwise interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed by Section 7 of the Act, the respondents, and each of them, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

9. By discriminating in regard to the terms and conditions of employment of their employees both at work and on strike, thereby encouraging membership in the Tri-State Union and the Blue Card Union and discouraging membership in the International Union, the respondents, and each of them, have engaged in and are engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

11. The respondents have not discriminated in regard to the hire and tenure of employment of the persons named in Appendix G within the meaning of Section 8 (3) of the Act.

12. The respondents have not refused to bargain collectively, within the meaning of Section 8 (5) of the Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Eagle-Picher Lead Company, and the respondent, Eagle-Picher Mining & Smelting Company, and their officers, agents, successors, and assigns, shall jointly and severally:

1. Cease and desist from:

(a) In any manner dominating or interfering with the administration of the Tri-State Mine, Mill & Smelter Workers Union, or the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or the formation or administration of any other labor organization

of their employees, or contributing financial or other support to the Tri-State Union of Mine, Mill & Smelter Workers Union, or to the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or to any other labor organization of their employees;

(b) Discouraging membership in International Union of Mine, Mill & Smelter Workers Locals Nos. 15, 17, 107, 108, and 111, or any other labor organization of their employees, or encouraging membership in Tri-State Mine, Mill & Smelter Workers Union, or in the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

(c) Urging, persuading, warning, or coercing their employees to join Tri-State Mine, Mill & Smelter Workers Union, or the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or any other labor organization of their employees, or threatening them with discharge or with non-reinstatement if they fail to join any such labor organization;

(d) Urging, persuading, warning, or coercing their employees to refrain from joining International Union of Mine, Mill & Smelter Workers Locals Nos. 15, 17, 107, 108, and 111, or any other labor organization of their employees, or threatening them with discharge or with non-reinstatement if they join any such labor organization;

(e) Permitting organizers and collectors of dues for Tri-State Mine, Mill & Smelter Workers Union or the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or any other labor organization to engage in activities among their employees in behalf of such labor organizations during working hours or on the respondents' property, unless similar privileges are granted to International Union of Mine, Mill & Smelter Workers Locals Nos. 15, 17, 107, 108, and 111, and all other labor organizations of their employees;

(f) Giving effect to any written or oral contract or agreement executed with the Tri-State Mine, Mill & Smelter Workers Union;

(g) Recognizing or in any manner dealing with the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or any other labor organization of their employees, as exclusive representative of their employees in an appropriate unit, unless and until such labor organization is certified by the Board as such exclusive representative;

(h) Recognizing or in any manner dealing with Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, as representative of any of their employees for the purpose of dealing with the respondents concerning grievances, labor disputes, wages, rates of pay, hours

of employment, or other conditions of employment, unless similar recognition is granted to International Union of Mine, Mill & Smelter Workers, or unless and until said Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers is certified by the Board as exclusive representative of their employees in an appropriate unit;

(i) Instigating, aiding, encouraging, or authorizing their agents or employees to use violence against the members or property of International Union of Mine, Mill & Smelter Workers Locals Nos. 15, 17, 107, 108, and 111, or of any other labor organization of their employees, for the purpose of discouraging membership therein;

(j) In any other manner interfering with, restraining, or coercing their employees in their exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

2. The respondent, Eagle-Picher Lead Company, and its officers, agents, successors, and assigns, shall take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to John R. Sheppard and Timothy Rayon immediate and full reinstatement to their former positions without prejudice to their former rights and privileges;

(b) Make whole John R. Sheppard and Timothy Rayon for any loss of pay they may have suffered by reason of their discharges, by payment to each of them of a sum equal to that which each would have earned as wages from the date of the respondent's discrimination against them to the date of such offer of reinstatement, less their net earnings¹⁰⁴ during such period; deducting, however, from the amount otherwise due to him monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects and paying over the amount so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for such work-relief projects and excluding, in the case of Sheppard, the period from August 31, 1938, to the date of this Order in the computation of the sum he would normally have earned from the respondent;

(c) Offer to the employees named in Appendix C immediate and full reinstatement to, and the person named in Appendix E immediate employment in, their former or substantially equivalent positions, or if no such positions be available then to positions for which they may be qualified, without prejudice to their seniority and other rights and privileges. All persons, or such number as may be neces-

¹⁰⁴ See footnote 178 above.

sary, hired since July 5, 1935, and not in its employ either during the week including May 8, 1935, or during the period between May 8, 1935, and July 5, 1935, shall be dismissed by the respondent to provide such employment for the persons above ordered to be offered and who shall accept reinstatement or employment. If, despite and after such dismissal, there is not sufficient employment immediately available for the persons above ordered to be offered and who shall accept reinstatement or employment, all available positions, if any, shall be distributed among such persons, without discrimination against any of them because of their union affiliation or activities, following such a system of employment as has been heretofore applied by the respondent in the conduct of its business, or some other non-discriminatory system. Those persons remaining after such distribution for whom no employment is immediately available and those who in accordance with what has been set forth above are reinstated or employed not in their former or substantially equivalent positions, but to positions for which they are qualified, shall be placed by the respondent on a preferential list, with priority determined among them in accordance with such system of employment, and thereafter, in accordance with said list, shall be offered reinstatement or employment by the respondent in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work;

(d) Make whole all persons listed in Appendix A in the manner set forth above in the section entitled "The Remedy," with the limitations in periods as set forth in parentheses after the names listed in Appendix A. In all cases, however, there shall be deducted from the amount of monies otherwise due each of said persons ordered to be made whole, monies received by him during the period or periods for which back pay is ordered on account of work performed upon Federal, State, county, municipal, or other work-relief projects, and the respondent shall pay over the amount, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(e) Withhold recognition from the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or any other labor organization of its employees, as exclusive representative of its employees in an appropriate unit, unless and until such labor organization is certified by the Board as such exclusive representative;

(f) Unless and until said Blue Card Union is certified by the Board as such exclusive representative, withhold recognition from said Blue Card Union as representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes,

wages, rates of pay, hours of employment, or other conditions of employment, unless similar recognition is granted to International Union of Mine, Mill & Smelter Workers;

(g) Immediately post notices in conspicuous places in and around its smelter, and maintain such notices for a period of ninety (90) consecutive days, stating that membership in Tri-State Mine, Mill & Smelter Workers Union, or the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or in any other labor organization of its employees, or nonmembership in International Union of Mine, Mill & Smelter Workers, is not required to obtain or retain employment with the respondent, and also stating that the respondent will cease and desist in the manner set forth in 1 (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j), and that it will take the affirmative action set forth in 2 (a), (b), (c), (d), (e), and (f) of this Order; and

(h) Notify the Regional Director for the Seventeenth Region in writing within twenty (20) days from the date of this Order what steps the respondent has taken to comply herewith.

3. The respondent, Eagle-Picher Mining and Smelting Company, and its officers, agents, successors, and assigns, shall take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to the employees named in Appendix D immediate and full reinstatement to, and to the persons named in Appendix F immediate employment in, their former or substantially equivalent positions; or if no such positions be available then to positions for which they may be qualified, without prejudice to their seniority and other rights and privileges. All persons, or such number as may be necessary, hired since July 5, 1935, and not in its employ either during the week including May 8, 1935, or during the period between May 8, 1935, and July 5, 1935, shall be dismissed by the respondent to provide such employment for the persons above ordered to be offered and who shall accept reinstatement or employment. If, despite and after such dismissal, there is not sufficient employment immediately available for the persons above ordered to be offered and who shall accept reinstatement or employment, all available positions, if any, shall be distributed among such persons, without discrimination against any of them because of their union affiliation or activities, following such a system of employment as has been heretofore applied by the respondent in the conduct of its business, or some other non-discriminatory system. Those persons remaining after such distribution for whom no employment is immediately available and those who in accordance with what has been set forth above are reinstated or employed not in their former or substantially equivalent

positions, but to positions for which they are qualified, shall be placed by the respondent on a preferential list, with priority determined among them in accordance with such system of employment, and thereafter, in accordance with said list shall be offered reinstatement or employment by the respondent in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work;

(b) Make whole all persons listed in Appendix B in the manner set forth in the section entitled "The Remedy," with the limitations in periods as set forth in parentheses after the names listed in Appendix B. In the case of W. E. Honeywell, the sum due shall be paid over to Hazel Honeywell, his duly appointed administratrix. In all cases, however, there shall be deducted from the amount of monies otherwise due each of said persons ordered to be made whole, monies received by him during the period or periods for which back pay is ordered on account of work performed upon Federal, State, county, municipal, or other work-relief projects, and the respondent shall pay over the amount, so deducted, to the appropriate fiscal agency of the Federal State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(c) Withhold recognition from the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or any other labor organization of its employees, as exclusive representative of its employees in an appropriate unit, unless and until such labor organization is certified by the Board as such exclusive representative;

(d) Unless and until said Blue Card Union is certified by the Board as such exclusive representative, withhold recognition from said Blue Card Union as representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless similar recognition is granted to International Union of Mine, Mill & Smelter Workers;

(e) Immediately post notices in conspicuous places in and around its mines, mills, and smelters, and maintain such notices for a period of ninety (90) consecutive days, stating that membership in Tri-State Mine, Mill & Smelter Workers Union, or the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, or in any other labor organization of its employees, or non-membership in International Union of Mine, Mill & Smelter Workers, is not required to obtain or retain employment with the respondent, and also stating that the respondent will cease and desist in the manner set forth in 1 (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j), and that it will take the affirmative action set forth in 3 (a), (b), (c), and (d) of this Order; and

(f) Notify the Regional Director for the Seventeenth Region in writing within twenty (20) days from the date of this Order what steps the respondent has taken to comply herewith.

AND IT IS FURTHER ORDERED that the allegations of the complaint that the respondents refused to bargain collectively, within the meaning of Section 8 (5) of the Act be, and the same hereby are, dismissed.

AND IT IS FURTHER ORDERED that the allegations of the complaint with respect to the persons named and listed in Appendix G be, and the same hereby are, dismissed.

APPENDIX A

Persons discriminated against by Lead Company and ordered to be awarded back pay except for periods indicated.

W. J. Barrett

Irvin Cannon

James Curry *

Claude Dalton (8-31-38 to Order)

William Davidson

Lester Davis

Edward W. Doty

Clarence Fanning

Lewis G. Fears

Lawrence Fleming

J. I. Gosnell ^b

Otto Gray

William I. Guinn *

Wesley Hamby

Curtis Harbaugh

Albert Hardesty

J. R. Hayes ^d

Lee Healy

Ed Huddleston

James A. McDonald

Orley F. Martin (on and
after 8-10-36)

Arthur Mays

John Mays

H. S. (Herb) Mead

Chauncey W. Mitchell *

Henry O. Olson

Charles A. Peterson

Howard Rhyne

Lawrence Riley

Joshua Roberts ^f

Homer Rogers

Walter Simpson

W. W. Staats ^e

John W. Smith

Arch Underhill

I. E. Vaughn

Earl Vinson

W. N. Vinson

Andrew Wade

Scott Yeakey

W. B. Yingst ^h

Cecil Yocum (on and after
approximately 3-1-36)

* Name appears in complaint as Curry.

^b Name appears in complaint as T. I. Goswell.

* Name appears in complaint as W. F. Quinn.

^d Name appears in the complaint as J. R. Hays.

* Name appears in complaint as W. K. Mitchell.

^f Name appears in complaint as Joyce (Josh) Roberts and John (Josh) Roberts.

* Name appears in complaint as Warren W. Slatts.

^h Name appears in complaint as W. B. Yengst.

APPENDIX B

Persons discriminated against by Mining Company and ordered to be awarded back pay except for periods indicated in parentheses.

W. H. Allen (6-1-37 to 3-8-38)	William H. Cagle ^a (8-31-38 to Order)
W. M. Atkinson	Joe H. Cagle
Joe H. Ballard	Raymond Cagle
Ernest D. Bankhead	Grant Cavin
John H. Bankhead (8-31-38 to Order)	George W. Clark (8-31-38 to Order)
John A. Basnett ^a (8-31-38 to Order)	Guss Cooper (8-31-38 to Order)
Theodore R. Bennett (on and after 4-15-37)	Roy Cottongin (8-31-38 to Order)
Harry C. Beyer ^b (8-31-38 to Order)	Carl Creason
A. G. Black	D. G. Creason (8-31-38 to Order)
Thomas Black (8-31-38 to Order)	Ira Danel
Harry Blasor	Raymond Danel ^c
Henry W. Bloom	Calvin Davis (8-31-38 to Order)
Fred Bogle, Jr.	Melgar Densman
Fred Bogle, Sr.	Lewis DeWitt (8-31-38 to Order)
James Bogle	Clyde O. Dimmitt ^f
Mark Bond ^e (8-31-38 to Order)	Clifford Doak (8-31-38 to Order)
Roy Boyd (8-31-38 to Order)	J. C. Dodson (8-31-38 to Order)
Ulyes Bradbury	J. C. Emerson
Nick Bratz (8-31-38 to Order)	Everett J. Faries (8-31-38 to Order)
H. E. Bridges (on and after 1-29-37)	M. D. Ferguson (8-31-38 to Order)
P. M. Brooks (8-31-38 to Order)	Martin Forrest
E. E. Browning (8-31-38 to Order)	Fred Foster (12-15-37 to 2-10-38)
A. F. Bruce (8-31-38 to Order)	Henry L. Freeman (on and after 7-6-37)
James O. Bryant (8-31-38 to Order)	John E. Freeman (8-31-38 to Order)
William Bryant	W. S. Fulkerson (8-31-38 to Order)
Excell Bullard	Kenneth Gary
Archie Bunch (8-31-38 to Order)	
R. F. Burgett	

^a Name appears in complaint as John A. Barnett.

^b Name appears in complaint as H. C. Beyers.

^c Name appears as W. E. Bond.

^d Name appears in complaint as Henry Cagle.

^e Name appears in complaint as Raymond Danvels.

^f Name appears in complaint as Claude O. Dimmitt.

876 DECISIONS OF NATIONAL LABOR RELATIONS BOARD

Luke A. Griffith ^{a1} (on and after Burton V. (Ben) Kearney (8-31-10-20-37) 38 to Order)
 Henry Hamilton (8-31-38 to Order) Albert Kinkade ^a
 Earl Kohl
 Ralph Haner ^a C. W. Lake
 Mack Hanks Alson (Allison) Lamb
 Cecil Glenn Harreld ^a Darrell Largent (on and after 8-1-37)
 Alfred Hatfield William Charles Laturner ^a (8-31-38 to Order)
 Roy Hatfield Roger Lindsay ^a
 W. E. Livingston
 G. Marion Headley (on and after 6-1-36) John McCormick (8-31-38 to Order)
 Ralph Henderson Charles McIntire ^a
 Fred McIntire ^a
 Dan Hensley ¹ J. F. McIntire ^a
 Milton McIntire ^a
 James Hensley ¹ Ray McIntire ^r (8-31-38 to Order)
 Kenneth McNutt
 Vivian C. Hiatt (8-31-38 to Order) Earl Martin (8-31-38 to Order)
 Elmer E. Mast ^a
 Bud (H. M.) Hilburn Ray Mayfield
 Orvil Hobson ^k Everett Messer
 George Messer
 Paul Hollingsworth (8-31-38 to Order) John B. Millner
 William Moore
 W. E. Honeywell ¹ (on and after 12-1-36) H. M. Murphy
 Jess Murray
 Cleve Horner Richard Murray (8-31-38 to Order)
 C. H. (Charles) Newman
 Kenneth Howe
 J. D. Hughes (on and after 11-14-35)
 Harry F. James
 Cecil Jeffries ^m
 Roscoe Johnson
 J. L. Jones
 Recie F. Jones (8-31-38 to Order)

^{a1} Name appears in complaint as Luke Griffith.^a Name appears in complaint as Ralph Haver.^a Name appears in complaint as C. G. Harold.¹ Name appears in complaint as Dan Hensley.¹ Name appears in complaint as H. R. Hensley.^a Name appears in complaint as Orval Holsen.¹ Payment to be made to Hazel Honeywell as administratrix as stated in Order.^m Name appears in complaint as Cecil Jeffreys.^a Name appears in complaint as A. L. Kenhage.^a Name appears in complaint as Wm. E. La Turner.^a Name appears in complaint as Arthur B. Lindsay.^a The last names of these men appear in complaint as MacIntyre.^a Name appears in complaint as Ray McEntire.^a Name appears in complaint as Elmer E. Mast.

W. C. Novak ¹ (8-31-38 to Order)	Raymond Spurlock
Eugene Overstreet (8-31-38 to Order)	Lee Stancoff
Walter Overstreet (8-31-38 to Order)	Fay Stone (on and after 3-28-37)
Walter Parmer	Willard (Wm.) Stoney
J. B. Parrish	Samuel Sweet
Newton J. Pettit ² (8-31-38 to Order)	Ernest Tennis ^{bb} (8-5-35 to 4-1-37)
Fred Pickett	James C. Thompson (on and after 2-9-36)
Fred Plyler ³	Roy L. Thornton ^{cc}
Albert O. Plummer ⁴ (on and after 1-10-37)	W. H. Todhunter
George Dewey Pruitt ⁵	Elmo A. Treece ^{dd} (8-31-38 to Order)
Arthur Puckett (8-31-38 to Order)	M. J. Vanderpool ^{ee}
Wesley Qualls (8-31-38 to Order)	Charles E. Van Kirk (8-31-38 to Order)
Robert Ransom (on and after 7-6-37)	Clarence Walker (on and after 5-15-36)
Charles T. Rhoades ⁶ (8-31-38 to Order)	George Wallace
James R. Rhodes ⁷	Charles Ward
Lewis Alfred Rice ⁸ (8-31-38 to Order)	Byron Warmack
Clarence Rice (8-31-38 to Order)	John G. Warren (8-31-38 to Order)
Harry Rice	Harlan Waughtal ^{ff} (8-31-38 to Order)
Harry E. Ridgway	William Webb (8-31-38 to Order)
Clifford Roy	L. D. Webster
Richard Sawyer	P. L. White (8-31-38 to Order)
Ted Schasteen (8-31-38 to Order)	Dorsey Whitlow (8-31-38 to Order)
Manee F. Selle	Floyd Williams (8-31-38 to Order)
Ross L. Shaw	Ora Williams (8-31-38 to Order)
William F. Sowder ⁹ (8-31-38 to Order)	Raymond Williams
Virgil Spiva (8-31-38 to Order)	

¹ Name appears in complaint as W. C. Novak.² Name appears in complaint as M. J. Pettitt.³ Name appears in complaint as Fred Plyler.⁴ Name appears in complaint as A. L. Plummer.⁵ Name appears in complaint as Dewey Pruitt.⁶ Name appears in complaint as Chas. T. Rhodes.⁷ Name appears in complaint as Ray Rhodes.⁸ Name appears in complaint as Alfred Rice.⁹ Name appears in complaint as W. F. Sowder.^{bb} Name appears in complaint as Earl (Earnie) Tennis.^{cc} Name appears in complaint as Roy F. Thornton.^{dd} Name appears in complaint as E. A. Treece.^{ee} Name appears in complaint as J. M. Vanderpool.^{ff} Name appears in complaint as Harlan Waughtah.

J. E. Wilson (8-31-38 to Order)	T. Dan Wood
Howard B. Wimberley	Glenn Woods
Todd Wisner	Otto Woods
Elmer Wood (from 8-9-37 to unspecified date)	William Young (8-31-38 to Order)

APPENDIX C

Persons to be reinstated by Lead Company.

W. J. Barrett	Arthur Mays
Irvin Cannon	John Mays
James Curry	H. S. (Herb) Mead
Claude Dalton	Chauncey Mitchell
William Davidson	Henry O. Olson
Lester Davis	Charles A. Peterson
Edward W. Doty	Timothy (Jim) Rayon
Clarence Fanning	Howard Rhyne
Lewis G. Fears	Lawrence Riley
Lawrence Fleming	Homer Rogers
J. I. Gosnall	Walter Simpson
Otto Gray	W. W. Staats
William I. Guinn	John W. Smith
Wesley Hamby	Arch Underhill
Curtis Harbaugh	I. E. Vaughn
Albert Hardesty	Earl Vinson
J. R. Hayes	W. M. Vinson
Lee Healy	Andrew Wade
Ed Huddleston	Scott Yeakey
James A. McDonald	W. B. Yingst

APPENDIX D

Persons to be reinstated by Mining Company.

W. H. Allen	James Bogle
W. M. Atkinson	Mark Bond
Joe H. Ballard	Roy Boyd
Ernest D. Bankhead	Ulyes Bradbury
John H. Bankhead	Nick Bratz
John A. Basnett	P. M. Brooks
Harry C. Beyer	E. E. Browning
A. G. Black	A. F. Bruce
Thomas Black	James O. Bryant
Harry Blasor	William Bryant
Henry W. Bloom	Excell Bullard
Fred Bogle, Sr.	Archie Bunch

William H. Cagle
 Joe H. Cagle
 Raymond Cagle
 Grant Cavin
 George W. Clark
 Guss Cooper
 Roy Cottongin
 Carl Creason
 D. G. Creason
 Ira Danel
 Raymond Danel
 Calvin Davis
 Melgar Densman
 Lewis De Witt
 Clyde Dimmitt
 Clifford Doak
 J. C. Dodson
 Everett J. Faires
 M. D. Ferguson
 Martin Forrest
 John E. Freeman
 W. S. Fulkerson
 Kenneth Gary
 Henry Hamilton
 Ralph Haner
 Mack Hanks
 Cecil Glenn Harreld
 Roy Hatfield
 Ralph Henderson
 Dan Hensley
 Vivian C. Hiatt
 Bud (H. M.) Hilburn
 Orvil Hobson
 Paul Hollingsworth
 Cleve Horner
 Kenneth Howe
 Harry F. James
 Cecil Jeffries
 Roscoe Johnson
 J. L. Jones
 Recie F. Jones
 Burton V (Ben) Kearney
 Albert Kinkade
 Earl Kohl

C. W. Lake
 Alson (Allison) Lamb
 William Charles LaTurner
 Roger Lindsay
 W. E. Livingston
 John McCormick
 Charles McIntire
 Fred McIntire
 J. F. McIntire
 Milton McIntire
 Ray McIntire
 Earl Martin
 Elmer E. Mast
 Ray Mayfield
 Everett Meser
 John B. Millner
 William Moore
 H. M. Murphy
 Jess Murray
 Richard Murray
 C. H. (Charles) Newman
 W. C. Novak
 Eugene Overstreet
 Walter Overstreet
 Walter Parmer
 J. B. Parrish
 Newton J. Pettit
 Fred Piler
 George Dewey Pruitt
 Arthur Puckett
 Wesley Qualls
 Charles T. Rhoades
 James R. Rhodes
 Lewis Alfred Rice
 Clarence Rice
 Harry Rice
 Richard Sawyer
 Ted Schasteen
 Mance F. Selle
 Ross L. Shaw
 William F. Sowder
 Virgil Spiva
 William (Wm.) Stoney
 Samuel Sweet

Ernest Tennis
 Roy L. Thornton
 W. H. Todhunter
 Elmo A. Treece
 M. J. Vanderpool
 Charles E. Van Kirk
 Charles Ward
 George Wallace
 John G. Warren
 Harlan Waughtal
 William Webb
 P. L. White

Dorsey Whitlow
 Floyd Williams
 Ora Williams
 J. E. Wilson
 Howard B. Wimberley
 Todd Wisner
 T. Dan Wood
 Glenn Woods
 Lawrence Woods
 Otto Woods
 William Young

APPENDIX E

Persons to be offered employment by the Lead Company.

Joshua Roberts

APPENDIX F

Persons to be offered employment by the Mining Company.

Fred Bogle, Jr.
 R. F. Burgett
 J. C. Emerson
 Fred Foster
 Alfred Hatfield
 James Hensley
 Kenneth McNutt
 George Messer
 Fred Pickett

Harry E. Ridgway
 Clifford Roy
 Raymond Spurlock
 Lee Stancoff
 Fay Stone
 Byron Warmack
 L. D. Webster
 Raymond Williams

APPENDIX G

Persons as to whom complaint is dismissed.

1. Those whose names were withdrawn

Ray Allbright
 Henry Bankhead
 August Bradshaw
 Claude Brooks
 H. A. Carlisle
 Jess Danel
 Herman Dean
 Paul Dudley (Duley)
 P. G. Eden

Harold Hatfield
 J. W. Howell
 Winth Jervis
 A. L. Johnson
 Clayton Johnson
 Hubert Johnson
 Steve Johnstone
 Charley King
 Lester Krokroshia

George L. Lake
 Ralph L. Lumbley
 Dan Henry Martin
 Joseph E. Martin
 Horace G. Murphy
 Dellos Neeley
 M. O'Dell

J. W. Overstreet
 J. B. Schneiders
 Harry Shallenberger
 Will Shears
 Orville Stever
 C. W. West
 Oscar Williams

2. Those found not to have been discriminated against

L. B. Anderson
 Otto Anderson
 Elmer Belk
 Leroy Berry
 Ed Blackburn
 Oven Blinzler
 Earnest K. Bogle^a
 Roy Bray
 Clabe Brown^b
 Loman Brown^c
 Elmer Dean
 Clay Dodd
 Pleas Duncan
 Everett Hall
 O. R. Hiatt
 W. C. Jewell
 J. D. (J. O.) Jones
 Manuel F. Jones^d

Jess Kitch
 Carl (Wm. C.) LaTurner
 Clarence Loflin^e
 Joseph Mallatt
 Wm. T. Mathiews
 Charles Owens
 Luke A. Patrick
 Joe Reece
 Tom Reece
 Albert Rigg
 James M. Roper
 C. E. Schroeder
 Elmer A. Tinkler
 Floyd Turbett
 William Van Treece^f
 James Webb
 G. W. White
 Floyd Woolever

3. Those who did not testify

Laurel Ashworth
 George M. Bankhead
 Earl Bartlett
 Lee Bennett
 Ben F. Black
 Thomas Bogle
 Basil Bradshaw
 W. W. Brooks
 W. T. Brown
 Don Cassell

Jim Chatman
 William Clark
 Raymond Connor
 L. W. Countryman
 Crabtree (?)
 Claib Crook
 G. C. Dale
 John Deverell
 John P. Ditson
 P. W. Duncan

^a Name appears in complaint as Ernie Bogle.

^b Name appears in complaint as Cleve Brown.

^c Name appears in complaint as Lowman Brown.

^d Name appears in complaint as M. S. Jones.

^e Name appears in the complaint as Clarence Dickland (Loughlan).

^f Name appears in complaint as W. N. Vantrece.

C. O. Emerson
J. W. Fitzgerald
Harvey Freeman
Thomas Freeman
Walter Ginn
James A. Gorman
W. L. Hannon
Ralph Harlow
Loyd Henderson
B. E. Hiatt
W. F. Hobbs
Z. T. Hobbs
Jack Hodson
Joe Hodson
R. D. Hollingsworth
Ernest C. Hopkins
Jesse Horton
Walter C. Howard
Dan Huest
Charles C. Jones
Claude Jones
F. L. Jones
Frank Jones
Ray Jones
Ernest Kelly
Jack LaBelle (Labaugh)
Richard Lawyer
Ernest L. Lewis
George W. Lewis
Jess E. Lewis
Samuel L. Lipps
Hiram Little

Louis Luton
Lafe McAlister
Floyd Mallatt
C. Martin
John Mitchell
E. J. Mooney
E. R. Moore
Joe Nowlin
Thomas Rhodes
L. D. Rice
Claude W. Rowland
Burl Russell
Otis Scott
Clarence Skaggs
R. B. Smith
W. R. Spencer
Clarence Stevenson
Bill Taylor
E. W. Thomure
Clarence Thomas
Truman Thomas
William A. Thompson
Floyd C. Titus
T. A. Treete
Tom Walker
John Warner
Arthur Webb
Fred C. Winner
H. E. Wisdom
Davis Wortham
Ira Young

MR. WILLIAM M. LEISENSON took no part in the consideration of the above Decision and Order.

United States of America

Before the National Labor Relations Board

In the Matter of

Eagle-Picher Mining & Smelting Company, a corporation,
and Eagle-Picher Lead Company, a corporation,
and International Union of Mine, Mill & Smelter
Workers, Local Nos. 15, 17, 107, 108, and 111

Case No. C-73

Amendment to Decision and Order

December 14, 1939.

On October 27, 1939, the National Labor Relations Board, herein called the Board, issued a Decision and Order in the above-entitled case.¹ On November 16, 1939, the Board gave notice that on December 10, 1939, or as soon thereafter as convenient, unless sufficient cause to the contrary had been shown, it would amend its Decision and Order in certain respects, set forth below. No sufficient cause to the contrary having been shown, the Board hereby amends its Decision and Order as follows:

1. In Appendix B, the words "(8-31-38 to Order)" are added after the names of the following individuals:

R. F. Burgett
J. C. Emerson
Fred Foster
James Hensley
Harry E. Ridgway
Raymond Spurlock
Byron Warmack
Raymond Williams

2. In Appendix B, the words appearing after the names of H. E. Bridges, Henry L. Freeman, G. Marion Headley, and Robert Ransom are changed to read: "(8-31-38 to Order)."

3. The name of Charles V. Beyer is added to Appendix B and Appendix D.

4. The name of Lawrence Woods is added to Appendix B.

5. The name of Earnest K. Bogle, with the accompanying footnote indicating that he was named in the complaint as Ernie Bogie, is stricken from Appendix G and added to Appendix B and to Appendix D; and the words "(8-31-38 to Order)" are added after his name in Appendix B.

6. The names of G. Marion Headley and Elmer Wood are added to Appendix F.

Mr. William M. Leiserson took no part in the consideration of the above Amendment to Decision and Order.

Petition for Intervention of the International Union of Mine, Mill & Smelter Workers, Locals 15, 17, 107, 108 and 111.

In the United States Circuit Court of Appeals for the Eighth Circuit.

Eagle-Picher Mining & Smelting Co., a corporation, et al.,
Petitioners,

Case No. 460. vs. Original.

National Labor Relations Board, Respondent.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Comes now the International Union of Mine, Mill & Smelter Workers, Locals 15, 17, 107, 108 and 111, a voluntary association and a labor union, and files its petition pursuant to the Act of Congress of July 5, 1935 (c. 372, 49 Stat. 453) known and cited as the National Labor Relations Act for intervention in this proceeding for the review of the decision and the order of the National Labor Relations Board, entered at Washington, D. C., on October 27, 1939, and respectfully shows unto the Court:

1. The National Labor Relations Board conducted a hearing pursuant to notice at Joplin, Missouri, on Decem-

ber 6, 1937, to April 29, 1938, before its duly designated Trial Examiner, said hearing being for the purpose of taking testimony on a complaint issued by the Board against the Eagle-Picher Mining and Smelting Company and the Eagle-Picher Lead Company, and arising out of charges theretofore filed by the International Union of Mine, Mill & Smelter Workers, Locals 15, 17, 107, 108 and 111. Said complaint alleged that the respondents had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3) and (5) and Section 2 (6) and (7) of the National Labor Relations Act. At said hearing, the International Union of Mine, Mill and Smelter Workers, Locals 15, 17, 107, 108 and 111, was allowed by the Trial Examiner to participate, and it did participate, as a party to said proceedings.

2. By its order of October 27, 1939, the National Labor Relations Board allowed affirmative relief to certain members of said International Union of Mine, Mill & Smelter Workers and who were employees of the Eagle-Picher Mining & Smelting Company and the Eagle-Picher Lead Company, and granted other relief consistent with findings that said Eagle-Picher companies have engaged in unfair labor practices contrary to the National Labor Relations Act. Said International Union and its said membership, therefore, are vitally concerned with the enforcement of said order of the Board entered on October 27, 1939, and from which this review was instituted by said Eagle-Picher Companies.

Wherefore, the International Union of Mine, Mill & Smelter Workers respectfully prays:

1. That by appropriate action or order herein the International Union of Mine, Mill and Smelter Workers, Locals 15, 17, 107, 108 and 111 be permitted to intervene as a party in this review of the decision, findings and order of the National Labor Relations Board, dated October 27, 1939, and that it further be allowed the privilege of filing briefs and appearing at the oral argument hereof.

2. And for such other and further relief as to the Court may seem just and proper and as the exigencies of the case may appear.

Dated: this 5th day of February, 1940.

INTERNATIONAL UNION OF MINL,
MILL & SMELTER WORKERS,
LOCALS 15, 17, 107, 108 and 111.

LOUIS N. WOLF,

Joplin, Missouri.

SYLVAN BRUNER,

Pittsburg, Kansas.

Attorneys for the International Union
of Mine, Mill & Smelter Workers,
Locals 15, 17, 107, 108 and 111.

State of Missouri,
County of Jasper—ss.:

Louis N. Wolf, being first duly sworn, upon his oath states that he is one of the attorneys for said intervener, the International Union of Mine, Mill & Smelter Workers, Local 15, 17, 107, 108 and 111; that he is duly authorized to file the within intervention petition; that he knows the contents of said petition, and that all of the facts therein stated are true.

LOUIS N. WOLF.

Subscribed and sworn to before me this 5th day of February, 1940.

(Notary Seal)

BLANCHE TALBOT,
Notary Public.

My commission expires: Nov. 17, 1941.

(Endorsed): No. 460, Original. Filed in U. S. Circuit Court of Appeals on Feb. 10, 1940.

(Order Permitting International Union of Mine, Mill & Smelter Workers, Local Nos. 15, 17, 107, 108 and 111, to Intervene, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1939.

Saturday, February 10, 1940.

Eagle-Picher Mining & Smelting Company, a corporation,
et al., Petitioners,

No. 460. vs. Original.

National Labor Relations Board, Respondent.

This cause coming on to be heard on the petition of the International Union of Mine, Mill & Smelter Workers, Local Nos. 15, 17, 107, 108 and 111, for leave to intervene as a party, and the Court having considered said petition for intervention tendered therewith, and it appearing to the Court that the said International Union of Mine, Mill & Smelter Workers, Local Nos. 15, 17, 107, 108 and 111, should be permitted to intervene and be heard, and the Court being duly advised in the premises,

It is, therefore, Ordered, Adjudged and Decreed that the International Union of Mine, Mill & Smelter Workers be and is hereby given leave to file brief (within the time allowed to the Board) and to be heard on oral argument.

February 10, 1940.

(Extracts from the "Statement, Brief and Argument for Petitioners" filed by the Companies when the cause was before the United States Circuit Court of Appeals for the Eighth Circuit, for enforcement or review.)

[215-216] [Eagle-Picher Mining & Smelting Company]

Claimants Whose Former Employment Disappeared

By Reason of Invalidation of National Recovery Act:

- | | |
|-----------------------|-----------------------|
| 1. Harry C. Beyer | 16. Richard W. Murray |
| 2. Tom W. Black | 17. Eugene Overstreet |
| 3. Ernest Bogle | 18. Arthur N. Puckett |
| 4. Roy Boyd | 19. Chas. T. Rhodes |
| 5. Paul M. Brooks | 20. Alfred L. Rice |
| 6. Wm. Henry Cagle | 21. Clarence Rice |
| 7. Roy Cottongin | 22. Virgil Spiva |
| 8. J. C. Dodson | 23. Raymond Spurlock |
| 9. John E. Freeman | 24. Byron F. Warmack |
| 10. Henry T. Hamilton | 25. Harlan Waughtal |
| 11. J. R. Hensley | 26. Dorsey Whitlow |
| 12. Vivian C. Hiatt | 27. Floyd Williams |
| 13. Wm. C. LaTurner | 28. Raymond Williams |
| 14. Ray McIntyre | 29. J. E. Wilson |
| 15. Orley F. Martin | 30. William Young |

By Reason of Sale of Bendelari Mine:

- | | |
|----------------------|---------------------|
| 1. E. E. Browning | 6. Henry L. Freeman |
| 2. Archie Bunch | 7. J. D. Hughes |
| 3. Calvin Davis | 8. W. C. Novak |
| 4. Jake C. Emerson | 9. C. E. Van Kirk |
| 5. Everett J. Faries | 10. P. L. White |

By Reason of Certain Mines not Starting up After the Strike:

- | | |
|----------------------|------------------------|
| 1. W. E. Bond | 14. G. M. Headley |
| 2. Nick Bratz | 15. Ralph Henderson |
| 3. H. E. Bridges | 16. Paul Hollingsworth |
| 4. A. F. Bruce | 17. Ben V. Kearney |
| 5. Jas. O. Bryant | 18. N. J. Pettit |
| 6. R. F. Burgett | 19. Albert O. Plummer |
| 7. Gus Cooper | 20. Robert M. Ransom |
| 8. D. G. Creason | 21. Harry E. Ridgway |
| 9. Lewis De Witt | 22. Fay F. Stone |
| 10. Clifford Doak | 23. E. A. Treece |
| 11. Fred Foster | 24. John G. Warren |
| 12. W. S. Fulkerson | 25. Ora Williams |
| 13. Luke A. Griffitt | |
-

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, A. D. 1941.

Eagle-Picher Mining and Smelting Company, a corporation,
and Eagle-Picher Lead Company, a corporation,
Petitioners,

No. 460 vs. Original

National Labor Relations Board, Respondent,
and

International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111, Intervener.

On Petition for Review of Order of National Labor Relations Board.

[May 21, 1941.]

Mr. John G. Madden (Mr. A. C. Wallace, Mr. H. W. Blair, Mr. Alfred Kuraner, and Messrs. Madden, Freeman & Madden were with him on the brief) for Petitioners.

Mr. Gerhard P. Van Arkel, Attorney, National Labor Relations Board (Mr. Robert B. Watts, General Counsel, National Labor Relations Board, Mr. Laurence A. Knapp, Assistant General Counsel, National Labor Relations Board, and Mr. Mortimer B. Wolf, Mr. Owsley Vose and Miss Helen F. Humphrey, Attorneys, National Labor Relations Board, were with him on the brief) for Respondent.

Mr. Louis N. Wolf (Mr. Sylvan Bruner was with him on the Petition for Intervention) for Intervener, International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108 and 111.

Before Sanborn, Woodrough, and Johnsen, Circuit Judges.

Sanborn, Circuit Judge, delivered the opinion of the Court.

The order of the National Labor Relations Board, which the petitioners seek to invalidate and the respondent asks to have enforced, requires the petitioners to cease and desist from dominating, supporting or favoring the Tri-State

Metal Mine and Smelter Workers Union¹ (hereinafter called Tri-State Union), or the Blue Card Union of Zinc & Lead Mine, Mill and Smelter Workers (hereinafter called Blue Card Union); from encouraging their employees to join those unions or any other union; from discouraging their employees from joining the International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108 and 111 (hereinafter called International Union); from giving effect to any contract with the Tri-State Union; from dealing with the Blue Card Union as exclusive representative of 'petitioners' employees, unless certified by the Board to be such representative; from recognizing the Blue Card Union as representative of any of their employees unless similar recognition is accorded to the International Union or unless the Blue Card Union is certified by the Board to be the exclusive representative of petitioners' employees; from instigating or encouraging the use of violence against the members of the International Union; and from interfering in any way with the rights of petitioners' employees with respect to self-organization and collective bargaining. The order of the Board, for the purpose of effectuating the policy of the National Labor Relations Act (49 Stat. 449; 29 U.S.C.A. §151 et seq.), further requires petitioners to take certain affirmative action, which includes the reinstatement of two discharged employees, with back wages, and also includes the payment of back wages, together with reinstatement or preferential treatment, to more than two hundred other employees who were found by the Board to have been refused reinstatement because of their union activities and affiliations.

This controversy had its inception in a strike called by the International Union on May 8, 1935, prior to the approval of the National Labor Relations Act on July 5, 1935. This strike closed the mines, mills and smelters in a large lead and zinc producing area known as the Tri-State District, being composed of parts of southwestern Missouri, northeastern Oklahoma, and southeastern Kansas and comprising an area approximately forty miles long and ten miles wide. A back-to-work movement followed

¹This Union is sometimes referred to in the Board's decision and order as "Tri-State Mine, Mill & Smelter Workers Union."

the strike, and this caused the formation of the Tri-State Union in the latter part of May, 1935, the main purpose of which was to reopen and keep open the mines, mills and smelters in this area. The back-to-work movement succeeded, and the strike of the International Union failed, although it was never formally terminated.

After the National Labor Relations Act became effective (July 5, 1935), the International Union filed charges with the Board accusing the petitioners of unfair labor practices within the meaning of §8 (1,) (3), and (5) and §2(6) and (7) of the Act. The Board issued its complaint upon these charges, alleging that petitioners had violated the Act by: (1) refusing to accept the International Union as the exclusive representative of their employees for purposes of collective bargaining, although the Union represented a majority of their employees; (2) locking out their employees; (3) dominating and supporting the Tri-State Union; (4) instigating and encouraging the use of violence against members of the International Union; (5) making membership in the Tri-State Union a condition of employment; (6) discriminating against the employees listed in the complaint with respect to employment because of their union activities and affiliations. The petitioners denied these charges and alleged that the Tri-State Union was dissolved in 1937, and that the Blue Card Union had been organized shortly thereafter and had become affiliated with the American Federation of Labor. A hearing was held at Joplin, Missouri, before William R. Ringer, who was appointed Trial Examiner by the Board. His conduct of this hearing, which lasted from December 6, 1937, to April 29, 1938, is deserving of the highest commendation. The Examiner in his Intermediate Report absolved the petitioners from having committed an unfair labor practice in refusing to recognize the International Union as the sole representative of the employees for purposes of collective bargaining. He also found that petitioners had not locked out their employees. He found that petitioners had dominated and supported the Tri-State Union and its successor, the Blue Card Union; that petitioners had made membership in the Tri-State Union and in its successor a condition of employ-

ment; that petitioners were in part responsible for the use of violence which occurred during the strike and the back-to-work movement; that there were discriminatory discharges and discriminatory refusals of reinstatement with respect to many of the employees listed in the complaint. He recommended what he considered an appropriate order in the light of his findings and conclusions. The petitioners and the International Union filed exceptions to the Examiner's report, and these were argued before the Board, which thereafter filed its decision and entered the order complained of by petitioners.

The petitioners challenge the order of the Board upon the following grounds: (1) that the findings that the petitioners dominated and supported the Tri-State Union and the Blue Card Union are not within the pleadings and are unsupported by substantial evidence; (2) that the findings that petitioners were responsible for the violence used against members of the International Union are not within the pleadings and are unsupported by substantial evidence; (3) that the Board was without authority to require the reinstatement of any of the employees listed in the complaint (referred to as claimants), because the labor dispute in consequence of which their work had ceased was not current at the time the Board took jurisdiction and the claimants were not then employees within the meaning of the Act; (4) that the findings of the Board with respect to the alleged discriminatory discharge of a claimant named Sheppard are not within the pleadings and are unsupported by substantial evidence, and that the order of the Board requiring the reinstatement of Sheppard with back pay is unsupported by the evidence and unauthorized; (5) that the order of the Board is in all respects arbitrary, unsupported by substantial evidence, and unauthorized by law.

For convenience, the contentions of the petitioners will be considered under two classifications: (1) those which relate to the alleged unfair labor practices from which petitioners are ordered to cease and desist; and (2) those which relate to the alleged discriminatory discharges and refusals to reinstate.

Without making this opinion unreasonably long, it is not possible to state in detail the facts or the evidence.

Many of the facts are not in substantial dispute, and since the only function of this Court is to determine whether the Board, acting within the compass of its power, has held a proper hearing, has made findings based upon substantial evidence, and has ordered an appropriate remedy (*National Labor Relations Board v. Bradford Dyeing Ass'n*, 310 U.S. 318, 342), we shall refer to the facts only so far as absolutely necessary for the purpose of this opinion.

The petitioners are large operators in the Tri-State District, are engaged in interstate commerce, and are subject to the National Labor Relations Act. The Eagle-Picher Lead Company (hereinafter called the Lead Company) is an Ohio Corporation, having its principal place of business in Cincinnati, Ohio, and is engaged in the mining and smelting of lead and zinc ores, the refining of lead and zinc, and the manufacture of lead and zinc products. It has a large manufacturing plant at Joplin, Missouri, and other plants in other states. The Eagle-Picher Mining & Smelting Company, a Delaware corporation, is a wholly owned subsidiary of the Lead Company, and owns, leases and operates mines in the Tri-State District. It has a lead smelter at Galena, Kansas, a zinc smelter at Henryetta, Oklahoma, and a "Central Mill" at Picher, Oklahoma. There are all together approximately fifty different operators of mills, mines or smelters in the District, who employ in the aggregate about 7,000 men. Wages and employment apparently vary with the market for lead and zinc.

The International Union is a labor organization which in 1935 was affiliated with the American Federation of Labor (A.F.ofL.). In 1936 it became affiliated with the Committee for Industrial Organization (C.I.O.). The International Union admits to membership persons working in mines, mills and smelters who do not hold executive or supervisory positions. Early in 1935 it had procured members from among the employees of the various operators in the Tri-State District, including the petitioners.

Petitioners' mines, mills and smelters in 1934 and up to May, 1935, were operated upon an open-shop basis. Petitioners had not discouraged their employees from joining the International Union. In March, 1935, a committee

from the International Union—without presenting credentials and without producing any evidence that a majority of petitioners' employees had joined the International Union—sought recognition of the Union as the exclusive representative of all of the petitioners' employees;—this in an interview with the management of the Galena Smelter of the Mining Company. The petitioners did not refuse to deal with any accredited committee of the International Union as the representative of all of their employees who were members of that Union, but declined to deal with the Union as the sole representative of all of petitioners' employees. On March 13, 1935, the International Union, by letter directed to all of the operators in the Tri-State District, suggested that the operators appoint a committee to bargain with a committee of the International Union on behalf of all of their employees in the Tri-State District as a unit. Apparently no conferences were thereafter sought with the operators. There was no complaint made about wages, hours or working conditions, and the sole demand of the International Union was that it be recognized by the operators in the District as the exclusive bargaining representative of all of the employees of all the operators. The International Union then took a secret strike vote, at which some 700 of its members voted, about 600 of them in favor of a strike to enforce the demand of the Union. A strike was called, to become effective May 8, 1935, at midnight. The petitioners received their first notice of the strike at about three o'clock in the afternoon of May 8, 1935. They then made preparations to, and did, close down their mines, mills and smelters at midnight. The strike was directed at all operators in the District. It closed virtually all of the mines, mills and smelters, and threw almost all of the employees out of work. Times had been hard, the market for zinc and lead had been poor, wages had been low, and in a short time those dependent upon the mines, mills and smelters for a livelihood were in distress. Some relief was afforded by the International Union to its members, and the Red Cross furnished some help generally.

The back-to-work movement started in the latter part of May. This was, naturally, resisted by the International Union. F. W. Evans, a mine operator and employer of

labor on good terms with employers and employees alike, was the leader in this movement. On May 24, 1935, he and 27 other men met on the open prairie near Quapaw, Oklahoma, to devise ways and means of ending the strike and reopening the mines, mills and smelters. Among the 28 men at this meeting there were three ground bosses of petitioner Mining Company and a number of ground bosses and foremen of other operators. On the afternoon of the same day, a back-to-work meeting was held by about 250 persons who met in Miami, Oklahoma, and the formation of an organization to reopen the various properties was proposed. Evans was the leader at this meeting. This was followed by a larger meeting on May 26, and by a still larger meeting on May 27, at which there was an attendance of about 3,000 persons. The Tri-State Union was organized at this meeting by adopting articles of association which had already been drafted and had been signed by twelve men, including Evans and six ground bosses, two of whom were employed by petitioner Mining Company.

Under the constitution of the Tri-State Union, any white male eighteen years old who had worked in any capacity in the lead or zinc mines, mills or smelters in the District was eligible for membership. To be on the executive committee, a member was required to have had five years experience "as a vice-principal" in the metal mines or smelters, and the same requirement was made with respect to any officer of a subordinate association. The twelve signers of the articles of association were elected by the organizers of the Tri-State Union as the executive committee of that Union, and the members of the executive committee chose F. W. Evans as president of the Union.

After the adjournment of the meeting of May 27, 1935, many of those who had attended it went to Pieher, Oklahoma, armed with pick handles, and paraded the streets. This parade was marked by excitement and disorder. The Oklahoma State Militia was called out, and the next day, under its protection, the mines, mills and smelters commenced to reopen, although they were still being picketed by the International Union.

The petitioner Mining Company on June 28, 1935, made an attempt to reopen its Galena, Kansas, smelter. It was

being picketed by the International Union, and the attempt to reopen it produced violence and gunfire. The smelter was in a virtual state of siege until martial law was declared by the Governor of Kansas, and the Kansas Militia took over, on June 29, 1935. Some members of the International Union were arrested by the Militia and were, by a military court, convicted of rioting. The smelter was finally reopened about July 16, 1935, and resumed production.

The membership of the Tri-State Union included executives and supervisory employees of the petitioners and of other operators in the District. The Tri-State Union, immediately after its organization, procured necessary financial help from the operators, including petitioners, through an arrangement for credit at a bank in Miami, Oklahoma. F. W. Evans brought about this arrangement. The Tri-State Union withdrew from the bank in June, 1935, \$15,000, and withdrew \$2500 on July 8, 1935. During the period when this money was being withdrawn and used, the Tri-State Union was engaged in furnishing help to persons out of work because of the strike and in furnishing protection to its members and to the mines, mills and smelters which had been reopened. On June 4, 1935, Evans, president of the Tri-State Union, entered into a written agreement with it which provided that he would, "so far as practicable and to the greatest extent possible, employ only members of" the Tri-State Union, and would "recognize and meet with your [the Tri-State Union's] representative or committee to the exclusion of all other organizations; and will endeavor to adjust matters which they may bring before us." On June 8, 1935, petitioner Mining Company entered into a similar agreement with the Tri-State Union.

In August, 1935, petitioner Lead Company—through Leonard Vaughn, its manager at the Joplin plant, and later through G. W. Potter, vice-president of the Mining Company and in charge of labor relations for both petitioners—urged the chemists in the Research Department of the Lead Company to join the Tri-State Union on the ground that their failure to join would be resented by the other men in the plant and might cause trouble. Kelsey

Norman, attorney for the Tri-State Union, was permitted by petitioner Lead Company, on its time and premises, to address the chemists of the Research Department. He stated to them, in effect, that the Tri-State Union was recognized as the exclusive union in the mines and smelters; that the Lead Company wanted them to join. Shepard, who was acting as Director of the Research Department and who had been instructed by Potter to have the men under him join the Tri-State Union, then advised each of the men under him that membership in the Union was compulsory and that he and the rest must join. The employees of the Research Department, including Shepard, signed applications and became members of the Union. The Tri-State Union was allowed to enter the plant of the Lead Company at Joplin, Missouri, to obtain applications for membership, issue membership cards, and collect dues.

The Tri-State Union published a weekly paper which was first called "The Metal, Mine and Smelter Worker", and later "The Blue Card Record". The policy of the paper was controlled by the executive committee of the Union. John Garretson, a member of the committee, was its first editor. In the latter part of 1935, he was succeeded by Glenn A. Hickman, the secretary of the Union. The paper was not sent through the mails, but was distributed by hand. Its policy was, naturally, anti-International Union, anti-affiliated Union, and pro-Tri-State Union. It held out, in substance, that the Tri-State Union was the only union acceptable to the operators of the District.

On April 14, 1937, two days after the Supreme Court of the United States had held that the National Labor Relations Act was constitutional and had ruled that such operators as the petitioners were subject to it, F. W. Evans, president of the Tri-State Union, and Kelsey Norman, its attorney, arranged for the affiliation of that Union with the A. F. of L. On April 18, 1937, at a meeting attended by 6,000 of the members of the Tri-State Union, a resolution was approved dissolving that Union and vesting authority in the executive committee to organize a new union to be affiliated with the A. F. of L. The executive committee was also authorized to hold, as trustees, the funds and property of the Tri-State Union, to be turned over to the new union.

when it was formed. On April 24, 1937, the A. F. of L. granted separate charters to Federal Labor Union No. 20,576, Picher and vicinity, Oklahoma; Federal Labor Union No. 20,577, Joplin and vicinity, Missouri; and Federal Labor Union No. 20,578, Galena and vicinity, Kansas. On May 28, 1937, a new union was organized by delegates from the three unions above mentioned. It was called "Blue Card Union of Zinc & Lead Mine, Mill and Smelter Workers." The same twelve men who were the executive committee of the Tri-State Union—which had come to be familiarly known in the District as the Blue Card Union—became the executive committee of the newly organized Blue Card Union, and that Union took over the funds and assets formerly owned by the Tri-State Union. Evans became the president of the Blue Card Union. On June 16, 1937, the A. F. of L. issued a certificate of affiliation to the Blue Card Union. The weekly paper, previously issued by the Tri-State Union, thereafter continued to be issued as before with some slight changes in policy appropriate to the affiliated status of the Blue Card Union. F. W. Evans tendered his resignation as president of the Union to William Green, president of the A. F. of L., in May, 1937, but it was not accepted until November of that year. By that time, all executives, foremen and other supervisory employees of the petitioners had withdrawn from the Blue Card Union.

There can be no doubt that the Board was justified in finding that the Tri-State Union and its successor, the Blue Card Union, were dominated and supported by the petitioners. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271; *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250; *National Labor Relations Board v. Falk Corporation*, 308 U.S. 453, 461; *International Association of Machinists, Tool and Die Makers Lodge No. 35, etc. v. National Labor Relations Board*, 311 U.S. 72, 81; *H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514, 519-520, 61 S. Ct. 320, 323.

The contention of petitioners that their alleged domination and support of the Blue Card Union was not an issue under the pleadings, we regard as without substantial merit. The petitioners themselves referred to the disso-

lution of the Tri-State Union and the organization of the Blue Card Union in their answer. The Examiner ruled, in effect, that whether the Blue Card Union was in fact the Tri-State Union in another dress was an issue. Whether there should have been a formal amendment to the complaint, we think is immaterial. The Examiner afforded petitioners ample opportunity to meet this issue, and no substantial rights of the petitioners were invaded in the trial and determination of the question. Compare, *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-351; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 225.

The Board's findings that the petitioners had encouraged membership in the Tri-State Union and the Blue Card Union, and had discouraged membership in the International Union, are supported by substantial evidence. The finding that they had, after the strike, required, as a condition of employment, membership in the Tri-State Union or in its successor, was not compelled by the evidence, but was not without substantial support in the evidence. That the Board might or should have decided to the contrary is immaterial. The fact that the evidence upon which one or more of the findings complained of are based consists, in whole or in part, of statements or acts of supervisory employees not shown to be within the scope of their authority did not, we think, preclude the Board from basing inferences upon such evidence. See and compare, *International Association of Machinists, Tool and Die Makers Lodge No. 35, etc. v. National Labor Relations Board*, 311 U.S. 72, 81; *H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514, 520, 61 S. Ct. 320, 323; *National Labor Relations Board v. Sunshine Mining Co.*, 9 Cir., 110 F.2d 780, 792.

Petitioners' contention that there is no substantial evidence to sustain the finding of the Board that they were responsible for the violence which had occurred when the members of the Tri-State Union clashed with the members of the International Union in connection with the progress of the back-to-work movement, raises a doubtful question. The Board, however, found that the Tri-State Union was dominated by the operators in the Tri-State District through Evans and their own supervisory employees. There

was an evidentiary basis for that finding. Under the circumstances, we cannot say that the Board's finding as to responsibility for violence is without any support in the evidence. Compare, *National Labor Relations Board v. Link Belt Co.*, 311 U.S. 584, 597, 61 S. Ct. 358, 366; *National Labor Relations Board v. Ford Motor Co.*, 6 Cir., 114 F.2d 905, 911; *H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514, 520, 61 S. Ct. 320, 323. And the Board is authorized to bar resumption of any unfair labor practice even though it has been abandoned. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 230.

It is our conclusion that so much of the Board's order as requires the petitioners to cease and desist from the unfair labor practices which it was found they had engaged in, is valid.

That brings us to the consideration of that part of the Board's order which deals with reinstatement and back pay.

Petitioners' contention that their employees who went out on strike May 8, 1935, and did not return to work were not entitled to be dealt with by the Board as employees because the labor dispute which caused the strike was not current at the time of the Board's hearing, is not tenable in view of *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, in which the Supreme Court said (page 344): "True there is no evidence that respondent had been guilty of any unfair labor practice prior to the strike, but within the intent of the Act there was an existing labor dispute in connection with which the strike was called." And (page 345): "The strikers remained employees under §2(3) of the Act which provides: 'The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *.' Within this definition the strikers remained employees for the purpose of the Act and were protected against the unfair labor practices denounced by it." See, also, *National Labor Relations Board v. Carlisle Lumber Co.*, 9 Cir., 94 F. 2d 138, 145, (certiorari de-

nied, 304 U. S. 575); *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 4 Cir., 91 F. 2d 134, 136-139, 112 A. L. R. 948, (certiorari denied, 302 U. S. 731). We have no doubt that those employees of the petitioners who went on strike on May 8 were on July 5, 1935, and thereafter employees of the petitioners for the purposes of the Act.

Discriminatory Discharges.

We shall next consider the question whether the Board could, under the evidence, order the reinstatement of the claimant Sheppard with back wages. The petitioners contend that Sheppard was an executive, and not an employee within the meaning of the Act; that a proper evidentiary basis for the order is lacking; and that his reinstatement is unauthorized.

We think that Sheppard was an "employee" within the meaning of the Act. The Trial Examiner was of the opinion that the evidence was insufficient to justify a finding that Sheppard was discriminatorily discharged. The Board found otherwise. The Board's determination must be accepted if sustained by substantial evidence.

Sheppard was a graduate chemist who began his work in the Research Department of the Lead Company in 1926; thereafter he became Assistant Director of Research; later acting Director of Research; and again Assistant Director of Research. He was acting Director of Research in the summer and fall of 1935 because the Director, Dr. Shaeffer, had resigned in August to accept another position. Sheppard's salary was originally \$350 a month and reached a high of \$591.66 in 1929 and 1930. Due to the depression, it had been reduced to \$450 a month in 1935. The business of the Research Department was to investigate and develop new and improved methods for making and using lead and zinc and their products and by-products. The duty of the Director of Research was to supervise and assist the chemists working under him. These chemists had been employed by Sheppard. Sheppard, after Shaeffer resigned, took orders from Mr. J. R. MacGregor, a vice-president of the Lead Company, whose office was in Cincinnati, Ohio. Neither Sheppard nor the chemists under him participated in the back-to-work movement or in the organization of the Tri-State

Union. On August 27, 1935, Sheppard was requested or directed by Mr. Vaughn, Manager of the Joplin plant of the Lead Company, to request the chemists in the Research Department to join the Tri-State Union. Sheppard posted a notice on the Bulletin Board in the Research Department that applications could be procured from him; and reported that he had done so. Sheppard and the chemists, as professional men, were opposed to joining, or being forced to join, a labor union of mine, mill and smelter workers, and Sheppard, on August 28, 1935, wrote to Mr. MacGregor, at Cincinnati, a three-page letter, asking him, in effect, whether membership in the Tri-State Union was a condition of employment in the Research Department. On the same day, in another letter, he sent to MacGregor a petition of all but one of the chemists, asking that they be not required to join the Tri-State Union. Sheppard also wired MacGregor asking him to advise Sheppard whether such membership was compulsory in the Research Department. On August 29, 1935, MacGregor telephoned Sheppard that membership in the Union was not compulsory and to hold matters in abeyance until MacGregor came to Joplin on September 2, 1935. Sheppard had several conferences in Joplin with MacGregor, who criticised him for keeping records about this particular matter. On September 6, 1935, MacGregor notified the employees of the Research Department by letter that the management had no requirement that any employee belong to any organization. Shortly after this, Kelsey Norman, attorney for the Tri-State Union, requested permission of Sheppard to address the employees of the Research Department. Sheppard wrote MacGregor and asked him whether it was agreeable to the management of the Lead Company to grant Norman's request, stating that ordinarily he (Sheppard) would not entertain such a request. MacGregor telephoned Sheppard, directing him to grant the request. At about this same time, G. W. Potter, vice-president of the Mining Company, called Sheppard to his office, and advised him, in effect, that the Lead Company wished him and the employees under him to join the Tri-State Union, and that it was Sheppard's duty to bring this about without making it a matter of record. Sheppard questioned Potter's authority to give him instructions, since the Research De-

partment was not a department of the Mining Company, but he stated to Potter that he would check up on Potter's authority. Sheppard then telephoned MacGregor and was told that Potter was in charge of all labor relations of petitioners in the District and to follow his instructions. This was confirmed by a letter of September 23, 1935. On September 25, 1935, Sheppard wrote MacGregor that he had granted permission to Norman to speak and that he would carry out the instructions received from Potter, although they "will include instructions which I feel are not in the interests of good working of a research department". Kelsey Norman made his address to the employees of the Research Department, urging them to join the Tri-State Union, and thereafter, as heretofore stated, Sheppard told them that he and they must join. Thereupon they all made out applications and became members of the Tri-State Union. Sheppard wrote Potter that he had carried out his instructions. In October, 1935, E. W. McMullen, a consulting chemical engineer, of Cincinnati, Ohio, was employed by the Lead Company to make a survey and investigation of the Research Department. McMullen was informed by the president of the Lead Company, its vice-president MacGregor, and its secretary-treasurer, that they desired to move the Research Department to Cincinnati and to improve its efficiency. McMullen then went to Joplin and spent two or three weeks investigating the operation of the Research Laboratory there. On November 13, 1935, he submitted to MacGregor a report in which he recommended the removal of the Research Department to Cincinnati. He criticised the efficiency of the Department and expressed the opinion that its constructive work could be doubled. At the hearing before the Examiner, McMullen testified that he found the relations between Sheppard and the employees under him to be bad, and that the employees were critical of Sheppard. McMullen testified that, after making his report, he was offered by the Lead Company the position of Research Director, and that he made it a condition of his acceptance that Sheppard, whom he considered inefficient, dictatorial and uncooperative, should be dismissed. The Board found that before McMullen went to Joplin the Lead Company had determined to employ him and to discharge Sheppard, and that in discharging

Sheppard it discriminated in regard to his hire and tenure of employment, and thus interfered with the rights of its employee guaranteed in §7 of the Act.

A majority of the Court are of the view that the Board's finding as to the discriminatory discharge of Sheppard is supported by substantial evidence. Such evidence, they feel, is found in the inferences arising from the facts that the Lead Company had employed McMullen to investigate Sheppard's department within a period of two weeks after part of the difficulty regarding his joining the Tri-State Union had occurred; that the Company had expressed dissatisfaction with Sheppard's attitude regarding the forcing of the members of his department to join the Tri-State Union, and had indicated that his reluctance constituted an obstruction to the Tri-State Union's program in the plant; that the Company appeared to have been especially irritated by Sheppard's attempt to keep a correspondence record of all that occurred with respect to labor matters in his department; and that McMullen's testimony fairly showed that it was contemplated at the time he first went to Joplin, and before he ever had prepared or submitted any report on Sheppard's department, that he was to succeed Sheppard. McMullen testified: "Q. Didn't you know * * * during the time that you were having these preliminary discussions with the gentlemen in Cincinnati, and after you come down here, that there was a very good possibility of you taking charge down here? A. There was a possibility, but it was not at all settled. * * * The surroundings of the position, the work that was required of the position, were all unknown to me. I had to find out what they were before I could accept it." These circumstances, together with the indisputable fact that the petitioners were guilty of a continuing course of unfair and discriminatory labor practices toward those employees who refused to conform to petitioners' Tri-State unionization plan and membership requirements satisfy the majority that the Board's finding with respect to Sheppard's discharge did not rest upon speculation or conjecture but upon substantial evidence.

The writer of this opinion disagrees with the majority view as to the sufficiency of the evidence to sustain the finding of the Board that Sheppard's discharge was dis-

criminatory, because he regards the evidence as equally consistent with two conflicting hypotheses, which are (1) that Sheppard was discharged for conduct connected with union activities, and (2) that he was discharged for the reasons testified to by McMullen, who was an unimpeached and credible witness.

The Board's finding that Timothy Rayon was discharged because of his activities on behalf of the International Union, of which he was a member is supported by substantial evidence.

Discriminatory Refusals To Reinstate.

As has already been pointed out, the International Union on May 8, 1935, had closed the mines, mills and smelters in the District by calling a strike. This strike, concededly, was not attributable to an unfair labor practice of petitioners. The Tri-State Union, which petitioners are found to have dominated and supported, caused or contributed to the reopening of petitioners' properties. On July 5, 1935, the petitioners were operating with about 500 men. Their operations were not fully manned, and the evidence is that some men were taken on, so that by November 1, 1935, they were employing 864 men. The Board found, justifiably, that petitioners from July 5, 1935, to November 1, 1935, had jobs available. It also found that the strike was in effect on July 5, 1935; that picketing by the International Union continued throughout the year 1935; and that the strike, up to the time of the hearing before the Examiner, had not been formally terminated. The Board determined that, in the absence of the unfair labor practice of petitioners in imposing an illegal condition upon reinstatement (membership in the Tri-State Union), they would have put back to work and paid wages to a portion of the group affected by the reinstatement and back-wage provision of its order. The theory upon which the Board proceeded was that, since the petitioners on July 5, 1935, were imposing this illegal condition upon reinstatement, and since the striking employees understood that they could be reinstated only by giving up their membership in the International Union and joining the Tri-State Union, it was not necessary to establish, as the basis for a finding of discriminatory refusal to reinstate, that each of the striking employees had ap-

plied for reinstatement or was willing or able to return to work or that his failure to work for and to earn wages from petitioner after July 5, 1935, was attributable solely to petitioners' unfair labor practice with respect to reinstatement. Most of the striking employees who are affected by the Board's order did not testify that they would have been willing to return to work for petitioners on July 5, 1935, or at any time before November 1, 1935, had it not been for petitioners' unfair labor practice. The petitioners contend that the evidence does not support the Board's finding of discriminatory refusal to reinstate such employees. This because they were on strike from July 5, 1935, to November 1, 1935, for the purpose of enforcing the demand of the International Union that it be recognized as the exclusive bargaining representative of all of the employees of petitioners, a demand which petitioners could not lawfully comply with, since the International Union did not represent a majority of petitioners' employees. Petitioners also contend that there is no evidence that the International Union was willing at any time before November 1, 1935, that its members should return to work unless such recognition was accorded; and no evidence that its members would have been willing to return to work without its consent. Petitioners point to the conference which the evidence shows took place on July 16, 1935, between G. W. Potter, representing the petitioners, and officials of the International Union, including Brown, its president. It appears that at this conference, in response to an inquiry by Potter as to the demands of the International Union, Brown stated, "We * * * make the same demand and just one: that in consideration of the fact that our organization has enlisted in its membership a substantial majority of the employees in this district, we are again demanding the right to act as sole collective bargaining agents for the employees"; that Potter stated that his information was that the International Union had only a minority of the employees, and proposed that the members of the International return to work, build up their numerical strength, and then make their demands for recognition upon petitioners; and that Brown then stated that those terms were acceptable if Potter would further agree in writing to "recognize them as their duly authorized col-

lective bargaining agents." Petitioners contend that what was said at this conference negatives the charge that there was a discriminatory refusal to reinstate the striking members of the International Union, and shows that their employees who were members of that organization remained away, not because of any unfair labor practice of petitioners, but because of the strike. Petitioners also call attention to a statement made by Brown's successor as president of the International Union in his annual report in 1937 with reference to the strike: "The situation in the Tri-State District is a serious one and has many ramifications. In my opinion the strike was ill-advised. The strike should have been called off as soon as the Militia arrived upon the scene, getting the men back to work and reorganizing so that they could be successful at some future date." With respect to the July 16, 1935, conference, the Board found that Potter's offer to return the strikers to work was not made in good faith and was subject to the implied condition that all members of the International Union returning to work should join the Tri-State Union.

This Court is of the opinion that if the evidence sustains the Board's finding that the striking employees would on July 5, 1935, or thereafter while jobs were available, have applied for reinstatement and would have returned to work except for the illegal condition of reinstatement imposed by petitioners, the Board had authority to make an appropriate order with respect to reinstatement and back wages. See and compare, *National Labor Relations Board v. Carlisle Lumber Co.*, 9 Cir., 94 F.2d 138; *National Labor Relations Board v. Sunshine Mining Co.*, 9 Cir., 110 F.2d 780; *National Labor Relations Board v. American Mfg. Co.*, 2 Cir., 106 F.2d 61. We are agreed that with respect to employees included in the reinstatement and back-wage provisions of the Board's order, who were shown to have indicated a willingness to return to work at any time after the strike and before November 1, 1935, the Board's order should be sustained. The members of this Court differ only as to the power of the Board to order the reinstatement, with back pay, of the striking employees who did not testify that they ever asked for reinstatement or would

have asked for reinstatement prior to November 1, 1935, had it not been for the fact that they knew of the requirement that they join the Tri-State Union.

A majority of the Court agree with the Board's view that, under the evidence, it was not necessary for the striking employees to have made application to return to work in order to be entitled to reinstatement and to an allowance of back pay. They regard the following findings and conclusions of the Board as clearly warranted by the evidence: "Every one of the approximately 200 claimants who testified stated, and we find, that it was their understanding that a blue card was necessary for reemployment, or for retaining employment. Under these circumstances we find that the striking employees were under no obligation to make the useless gesture of applying for their jobs." A majority of the Court approve the ruling of the Board, quoted by it in its decision, that "Willingness to reinstate employees only on the conditions above described, conditions which the respondent [the employer] had no right to attach, is equivalent to absolute refusal to reinstate." The majority further agree with the Board that, in view of the illegal condition which the petitioners had imposed upon the right to reinstatement, it was not necessary to prove that each individual employee was willing and able to return to work. The majority think there had been sufficient individual applications for reemployment on the part of International Union members prior to July 16, 1935, to indicate the need and desire of the men generally for reemployment, if the illegal condition was removed. It was a proper inference, say the majority, that the conference of July 16, 1935, was not held by the petitioners in good faith or with any intention to permit the strikers to return to work without joining the Tri-State Union; and that, while some of the International Union leaders, as a front, sought to re-assert their strike demands in the conference, it was clearly obvious that the International Union had by that time been so completely outmaneuvered by the tactics of the petitioners that its original demands had become only a minor and feeble note in the succeeding events. In this situation, according to the majority of the Court, the Board was justified in holding that, except as to such particular individuals as had indicated that they were not willing to return to work unless

the International Union was recognized, the men as a group could properly be regarded as desirous of returning and as entitled to do so, in the absence of any express showing to the contrary. And since the men as a group, with individual exceptions who were eliminated by the Board, were thus entitled to réemployment, the questions of reinstatement and back-pay allowance, under the statute and under the ruling in *Phelps Dodge Corporation v. National Labor Relations Board*, U.S., 61 S. Ct. 845, related, in the view of the majority of this Court, solely to the means to be employed to "effectuate the policies of this Act." Of the form and scope of these means, the majority think the Board was the sole judge.

The writer of this opinion disagrees with the majority only with respect to the reinstatement and back-wage provisions of the Board's order in so far as those provisions cover the striking employees who were not shown to have been willing to abandon the strike and to return to work prior to November 1, 1935. The disagreement of the writer is based upon the conclusion that that portion of the Board's order is punitive, and not remedial, because of the absence of evidence to justify a finding that the loss of wages suffered by these members of the group was attributable to the unfair labor practice of petitioners, and was not attributable to the strike, for which the petitioners were not responsible. See and compare, *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U.S. 240, 258; *Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7, 10-13.

Petitioners contend that the Board's method of apportioning wages, the loss of which it has attributed to the unfair labor practice of petitioners, among the members of the group covered by its order, was unauthorized. We cannot see that petitioners are prejudiced in any way by the Board's method of apportionment, and we think that the Board was within its rights in determining what distribution of back wages among the members of the group found to have been discriminated against with respect to reinstatement would best effectuate the policies of the Act.

The petitioners challenge the Board's authority to include in its order certain striking employees who were convicted in military courts of rioting or who were in-

dicted for crime in other courts. We think petitioners' contentions in this regard are without substantial merit. They raised no such issue in their answer, and the evidence does not show that they had any rule or policy against the employment of such persons or that their refusal or failure to reinstate any of the striking employees was based upon his conviction or indictment. See and compare *National Labor Relations Board v. Bradford Dyeing Assn.*, 310 U.S. 318, 341-342.

The petitioners further contend that the Board was guilty of laches. The controversy before the Board was initiated without serious delay, and, while it was long drawn out, there is no substantial basis for believing that the Board's powers were in any way impaired by the lapse of time during which the proceedings were pending and undisposed of.

We think it is unnecessary to discuss further questions.

The Board has requested certain modifications of its order, largely formal in character. These requests are granted.

The decree of this Court will be that the order of the Board, with the modifications requested by it, be affirmed and enforced.

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 460 Original—May Term, 1941.

Friday, June 27, 1941.

Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company, Petitioners

vs.

National Labor Relations Board, Respondent.

On Petition for Review and on Request for Enforcement of an Order of the National Labor Relations Board.

Decree Enforcing an Order of the National Labor Relations Board.

This cause coming on to be heard upon the petition of Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company to review and set aside and upon

the request of the National Labor Relations Board for the enforcement, with certain modifications, of a decision and order of the Board dated October 27, 1939, as amended on December 14, 1939, and the Court, having heard arguments of counsel, being fully advised in the premises, and having on May 21, 1941, handed down its opinion enforcing said order as amended, with the modifications requested by the Board, now therefore, in conformity therewith, it is hereby.

Ordered, Adjudged and Decreed that Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company, their officers, agents, successors, and assigns, shall jointly and severally:

1. Cease and desist from:

(b) Discouraging membership in International Union of Mine, Mill & Smelter Workers Locals Nos. 15, 17, 107, 108, and 111, or any other labor organization of their employees, or encouraging membership in Tri-State Mine, Mill & Smelter Workers Union, or in the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

(j) In any other manner interfering with, restraining, or coercing their employees in their exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

2. The Eagle-Picher Lead Company, and its officers, agents, successors, and assigns, shall take the following affirmative action which the Board finds will effectuate the policies of the Act:

(c) Offer to the employees named in Appendix C immediate and full reinstatement to, and the person named in Appendix E immediate employment in, their former or substantially equivalent positions, or if no such positions be available then to positions for which they may be qualified, without prejudice to their seniority and other rights and privileges. All persons, or such number as may be necessary, hired since July 5, 1935, and not in its employ either during the week including May 8, 1935, or during the period between May 8, 1935, and July 5, 1935, shall be dismissed by the Lead Company to provide such employment for the persons above ordered to be offered and who shall accept reinstatement or employment. If, despite and after such dismissal, there is not sufficient employment immediately available for the persons above ordered to be offered and who shall accept reinstatement or employment, all available positions, if any, shall be distributed among such persons, without discrimination against any of them because of their union affiliation or activities, following such a system of employment as has been heretofore applied by the respondent in the conduct of its business, or some other non-discriminatory system. Those persons remaining after such distribution for whom no employment is immediately available and those who in accordance with what has been set forth above are reinstated or employed not in their former or substantially equivalent positions, but to positions for which they are qualified, shall be placed by the Lead Company on a preferential list, with priority determined among them in accordance with such system of employment, and thereafter, in accordance with said list, shall be offered reinstatement or employment by the Lead Company in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work;

(d) Make whole all persons listed in Appendix A in the manner set forth above in the said Board's decision and order, as amended, with the limitations in periods as set forth in parenthesis after the names listed in Appendix A;

3. The Eagle-Picher Mining and Smelting Company, and its officers agents, successors, and assigns, shall take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to the employees named in Appendix D immediate and full reinstatement to, and to the persons named in Appendix F immediate employment in, their former or substantially equivalent positions, or if no such positions be available then to positions for which they may be qualified, without prejudice to their seniority and other rights and privileges. All persons, or such number as may be necessary, hired since July 5, 1935, and not in its employ either during the week including May 8, 1935, or during the period between May 8, 1935, and July 5, 1935, shall be dismissed by the Mining Company to provide such employment for the persons above ordered to be offered and who shall accept reinstatement or employment. If, despite and after such dismissal, there is not sufficient employment immediately available for the persons above ordered to be offered and who shall accept reinstatement or employment, all available positions, if any, shall be distributed among such persons, without discrimination against any of them because of their union affiliation or activities, following such a system of employment as has been heretofore applied by the Mining Company in the conduct of its business, or some other non-discriminatory system. Those persons remaining after such distribution for whom no employment is immediately available and those who in accordance with what has been set forth above are reinstated or employed not in their former or substantially equivalent positions, but to positions for which they are qualified, shall be placed by the Mining Company on a preferential list, with priority determined among them in accordance with such system of employment, and thereafter, in accordance with said list shall be offered reinstatement or employment by the Mining Company in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work;

(b) Make whole all persons listed in Appendix B in the manner set forth in the said Board's decision and order, as amended, with the limitations in periods as set forth in parenthesis after the names listed in Appendix B. In the case of W. E. Honeywell, the sum due shall be paid over to Hazel Honeywell, his duly appointed administratrix;

.

June 27, 1941.

No. 460

**In the United States Circuit Court of Appeals
for the Eighth Circuit**

**EAGLE-PICHER MINING AND SMELTING COMPANY, A
CORPORATION AND EAGLE-PICHER LEAD COMPANY,
A CORPORATION, PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**PETITION FOR RULE TO SHOW CAUSE, TO REMAND,
AND FOR OTHER RELIEF**

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**In the United States Circuit Court of Appeals
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No. 460

**EAGLE-PICHER MINING AND SMELTING COMPANY, A
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v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**PETITION FOR RULE TO SHOW CAUSE, TO REMAND,
AND FOR OTHER RELIEF**

*To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Eighth Circuit:*

The National Labor Relations Board (herein called the Board) respectfully petitions this Court for a Rule requiring Eagle-Picher Mining and Smelting Company (herein called the Mining Company) and Eagle-Picher Lead Company (herein called the Lead Company) to show cause why paragraphs 2 (d) and 3 (b) of the Decree heretofore entered by this Court in the above-entitled proceeding should not be vacated, and why so much of this cause as is affected by said paragraphs 2 (d) and 3 (b) should not be remanded to the Board for further proceedings consistent with facts now for the first time appearing, and why other and further relief should not be granted in the prem-

ises. In support of this petition, the Board, upon information and belief, shows the Court as follows:

I

From December 6, 1937, to April 28, 1938, a hearing was held before a Trial Examiner of the Board pursuant to complaint which it had issued against the Mining Company and the Lead Company (herein collectively called the Companies). Thereafter, and on October 27, 1939, the Board issued its order against the Companies (16 N. L. R. B. 727) based upon findings that the latter had committed unfair labor practices. Subsequently, and on July 2, 1941, this Court duly entered its decree (dated June 27, 1941) enforcing the Board's order with modifications not here material. A copy of the Decree, setting forth the portions pertinent hereto, is made part of this petition, and marked Exhibit A (App. 1).¹ Said provisions of the Decree are substantially identical in wording with the corresponding portions of the order of the Board which are enforced by the Decree.

II

The Companies, upon the hearing and thereafter, inadvertently or otherwise, withheld from the Board material facts peculiarly within their knowledge concerning the employment situation existing in the enterprises involved in the complaint. By means of evidence and representations, they induced the Board, unaware of the facts so withheld and because said

¹ For the convenience of the Court, the exhibits of this petition have been included in a separately bound Appendix, the pages of which are here referred to by the symbol "(App. —)."

facts were not made known to it, mistakenly to conclude that an unusual condition existed, that the customary and normal remedy of full back pay to each employee discriminated against was inapplicable, and that a special remedy must be devised to conform to a state of conditions which in fact did not exist. So much of the Board's order as prescribes this special remedy is enforced by paragraphs 2 (d) and 3 (b) of the Decree. The said remedy is grossly unsuited to the situation which has now been discovered actually to have existed prior to and since the hearing. Applied under this situation, the remedy deprives said employees of due compensation for their losses, and considerations of equity, public policy, and the integrity of the administrative-judicial process require its correction.

The foregoing considerations, more particularly set forth below in paragraphs III to XI, inclusive, warrant setting aside said sections of the decree and a remand to the Board of so much of this cause as is affected thereby for the purpose of framing a remedy suited to the facts now disclosed.

III

The Complaint issued by the Board alleged, in part, that at all times since July 5, 1935, the Companies, in violation of Section 8 (3) of the Act, had discriminated against striking employees in regard to hire and tenure of employment by refusing to reemploy them upon resumption of previously suspended operations at mines, smelters, and a mill operated by the Companies in the Tri-State Mining Area of Missouri,

Kansas, and Oklahoma. The Companies, having unique and peculiar knowledge of their own operations and all conditions affecting reemployment, as a defense to such allegation and in explanation of their failure to reemploy these employees, adduced at the hearing evidence of reorganization of their method of operations designed to show the need for fewer employees. This evidence consisted of proof of the sale of certain mines, the suspension of operations in other mines, reduction in size of crews, and the elimination and abolition of specific jobs. Thereby the Companies sought to show not only that at all times after July 5, 1935, employment opportunities at their properties were and would continue to be substantially less than they had been when the properties had last been operated prior to said date, but, in addition, that at all times after July 5, 1935, there had been and would be less than sufficient work to afford employment to all the claimants. Typical of the evidence which the Companies adduced to support their contention in this regard are the extracts from the stenographic transcript of the original hearing set forth in Exhibit B of this petition (App. 6-14).

The Companies affirmed and repeated their representation and contention as to the insufficiency of work for all the claimants in excepting to the Trial Examiner's recommendations that the said employees be reinstated and made whole for the losses they suffered by reason of the Companies' discrimination. In this

connection, the following excerpts are characteristic of exceptions filed by each of the Companies:

120. Respondents except to the recommendation in the Intermediate Report (par. 3 (b)) to the effect that respondent Mining Company make whole the persons designated for any losses of pay they may have suffered by reason of respondent Mining Company's alleged discrimination in the manner specified * * * for the reason that said recommendation as to each of said persons * * * ignores inter alia: * * * that there is no evidence that said person's former employment or any employment with respondents or either of them, was available on or after July 5, 1935 * * * that the former employment of said person has disappeared due to a change of operations * * * that the former employment of said person has been discontinued and is no longer available * * * ignores the evidence of respondent's requirements and availability of work; * * *

IV

In its decision and order issued October 27, 1939, the Board, upon the basis of positive evidence of discrimination, found that the Companies, at all times since July 5, 1935, had discriminated against 209 employees as a class (hereinafter referred to as the claimants) in the matter of hire and tenure of employment. The Board found that there had been curtailment of employment opportunities as contended

² The Companies similarly represented and contended, regarding their respective enterprises, in their Exceptions Nos. 119, 121, 122, and 123.

and represented by the Companies, but that the claimants were discriminatorily denied an equal opportunity with all other old employees who applied for work (herein termed the reapplicants)³ to share in such jobs as remained available. Exhibit C of this petition sets forth pertinent extracts from the decision, in which the Board considered the issue of discrimination in connection with the factor of availability of employment as the Companies had made it appear (App. 15-23). Accordingly, as part of the affirmative remedial action which the Board found would effectuate the policies of the Act, the Board ordered the Companies to offer immediate reinstatement to as many claimants as could be rehired and to place the remainder on a preferential hiring list (see Exhibit D, "The Remedy," App. 25-26; Exhibit A, App. 2-3, 4-5).

V

In connection with additional remedial action necessary to restore the situation as nearly as possible to what it would have been but for the discrimination, the Board also considered the matter of reimbursement to be made to the claimants for their wage losses. Normally, the Board would have directed payment of back pay in full to be made to each claimant from the date of discrimination to the date of offer of reinstatement or placement on a preferential rehiring list, allowing due credit to the Companies, however, for net interim earnings received from other employment.

³ By "old" employees is meant all employees on the pay roll of the Companies on May 8, 1935, when the strike began (Exhibit D; App. 27).

Since the Companies had shown conclusively that employment opportunities had been permanently and substantially curtailed subsequent to July 5, 1935, the Board necessarily credited their representation and contention that at all times thereafter, there were and would continue to be less positions available than normally would provide for the combined number of claimants and reapplicants. From the employment situation as the Companies had made it appear, the Board was led to conclude that "a peculiar factual situation" existed under which the normal remedy of full back pay would be inappropriate, and hence that the normal remedy should be withheld and a specially adapted remedy devised. As to most positions, the Board found, no special skill or abilities ordinarily were necessary, and, hence, one employee would be as well qualified therefor as another (App. 18, 20-21, 27-28). The Board found, however, that there was no sure way to ascertain which claimants normally would have been selected for employment. In consequence, under the employment situation as the Companies made it appear, it was impossible to ascertain the specific claimants who had suffered wage deprivation and should be awarded the back pay allocable to those positions which normally would have gone to members of their group.

To award to each of the claimants full wages for the period of discrimination, under the facts as the Companies made them appear, would have resulted in requiring the Companies to remit a sum greater in aggregate than they would have paid out to the claim-

* App. 27; 26 N. L. R. B., p. 834.

ants in the absence of discrimination. To avoid this seeming inequity to the Companies, the Board devised a formula as set forth in the portion of its decision entitled "The Remedy" (Exhibit D; App. 24-33), whereby all claimants should participate in reimbursement, the total amount to be paid being intended to be no more than the aggregate wages which the Companies normally would have disbursed to them as a group. The Board directed that there be computed as a lump sum the total amount of wages actually paid to all employees at work from July 5, 1935, to the date of compliance with the reinstatement provisions of the Board's order. On the showing made, the Board assumed that even in the absence of discrimination, all available positions would not have gone to the claimants alone but would have been distributed, proportionately among the claimants and reapplicants. Accordingly, the Board directed that not all of the lump sum be distributed among the claimants, but only the portion thereof determined by governing fraction, having, as its numerator, the number of claimants, and, as its denominator, the total number of claimants plus reapplicants. In conclusion, the Board prescribed apportionment of this fractional amount among the claimants, allowing for the deduction from the share of each of full net earnings received elsewhere during the period for which back pay was to be computed.

The Companies' representation of sweeping and lasting curtailment of employment opportunities led the Board to understand—contrary to actual fact—that only on rare occasions and for brief periods, if at all, had there been or would there be available

jobs equal to or in excess of the total number of claimants and reapplicants. Accordingly, the Board, being satisfied from the ostensible circumstances that the entire situation would be adequately provided for under the general plan of the formula did not specifically provide for full back pay during such seemingly inconsequential periods.⁵

The Board would not have thus departed from the normal and usual remedy of awarding full back pay to each claimant but for its reliance upon the aforesaid representation of the Companies as to existence of insufficient employment to provide normally for all the claimants.

VI

After the Board issued its said order, the Companies, pursuant to Section 10 (f) of the Act, filed with this Court a petition to review the Board's order. In their petition, as more particularly appears in items numbered 83, 152, 153, 158, and 159 of the specifications of alleged error therein, the Companies, in terms similar to those which they had previously employed in their said exceptions to the Trial Examiner's recommendations, referred to in paragraph III hereof (*supra*, p. 5), realleged and reaffirmed their representation and contention as to the diminution of employment opportunities available for the claimants.

⁵ Instead, the Board directed that for any given period in which the number of employees then working might exceed the number of claimants, only the earnings of so many employees as should equal the number of claimants should be considered in the computation, and that the amount to be credited to the lump sum for this period should be arrived at by multiplying the average earnings by the number of claimants (App. 29-30, fn. 185).

in their respective properties. The Board was thereby misled into adhering to its assumption that opportunities for employment of the claimants had been permanently curtailed, and hence that the prescribed remedy was appropriate and did not require revision.

VII

On July 2, 1941, the Court, pursuant to its decision of May 21, 1941,* holding the Board's findings and remedy to be duly warranted in the premises, and in reliance upon the circumstances as found by the Board, entered its Decree enforcing in full the provisions of the Board's order directing reinstatement or placement on a preferential rehiring list of employees as therein provided, and, in addition (by paragraphs 2 (d) and 3 (b) of the Decree), payment of back pay as provided in paragraphs 2 (d) and 3 (b) of said Order. On August 23, 1941, the Companies, pursuant to the Order as now enforced, offered reinstatement to the claimants, thereby fixing August 23, 1941, as the terminal date of the period for which back pay is payable to all employees named in said paragraphs 2 (d) and 3 (b) of the Decree.

VIII

Following the Companies' said offer of reinstatement, the Board made demand of the Companies that they comply with paragraphs 2 (d) and 3 (b) of the Decree and also furnish the Board with the basis of their computations as to the amount of back pay due and payable thereunder. The Companies made their

* Reported in 119 F. (2d) 903.

† Except James Curry, a claimant named in paragraph 2 (c) of the Decree, to whom the Lead Company refused and still refuses to offer reinstatement.

computations available to the Board on or about May 1, 1942, at which time they tendered the sum of \$8,409.39 in purported full payment of all back pay owing to the claimants under said paragraphs of the Decree. Subsequent to the making of their said tender in the sum of \$8,409.39, the Companies averred that no more than \$5,400 was due and owing to the claimants by virtue of the formula specified in said remedy.

In accordance with its usual procedure, the Board thereupon, in order to verify the accuracy of the computations, and to ascertain whether said paragraphs of the Decree had been duly complied with, examined and analyzed the pay rolls and records involved. The Board's investigation required and employed the services of numerous members of its staff for a period of several months. Completed in or about October 1942, it disclosed the fact, not theretofore made known, that without taking into account any new employment created by the subsequent acquisition of properties from other owners (including, specifically, but not limited to, Commerce Mining & Royalty Company and the Mary M. Mining Company), and despite any curtailment of employment, the Companies, in their operations conducted after July 5, 1935, and during the entire period up to and including August 23, 1941, *were in a position to accord full employment at all times both to all reapplicants continuing to be available for work, and to all claimants.** The Board's

* With the exception that the Mining Company, at its Tri-State mines during the week ending September 10, 1936, and at its smelter located at Galena, Kansas, during 33 isolated weeks in the period from July 5, 1935, to August 23, 1941, was in a position to employ on the average at least 95 percent (instead of 100 percent) of the total number of claimants and available reapplicants.

examination and analysis further revealed that the Companies had been continuously employing a total number of new employees equal to and at times substantially in excess of the total number of claimants and available reapplicants and had paid wages to said new employees in a sum equal to and at times in excess of the aggregate amount which they normally would have paid to the claimants and available reapplicants. A compilation showing the extent of employment available subsequent to the resumption of operations by the Mining Company and by the Lead Company is set forth in Exhibits E and F, respectively, of this petition (App. 36-46). This information as to employment conditions was peculiarly within the Companies' knowledge, but was not submitted or disclosed to the Board at any time. The Board discovered it only after laborious and exhaustive scrutiny and comparison of the Companies' voluminous pay rolls and other records covering the period from July 5, 1935, to August 23, 1941.

IX

It now appears for the first time, therefore, that in absence of the discrimination of the Companies, each claimant normally would have been accorded full employment and would have earned full wages from the time of resumption of operations after the onset of the strike up to the date of offer of reinstatement, and that in the fulfillment of the statutory purpose to make whole each employee who had suffered wage deprivation in consequence of the Companies' said unfair labor practices, the Companies properly should

have been required to reimburse fully each such employee. However, the Board's remedy, as applied to the actual situation now discovered, requires the Companies to make good to each only a fractional portion of his loss. Hence, as a direct consequence of and in reliance upon the Companies' representation and contention, the Board had been moved to prescribe, and the Court, on the basis of the circumstances as they had been made to appear, had been moved to enforce, a remedy which, under the actual facts now appearing, is grossly inequitable to those who had suffered deprivation of earnings in consequence of the Companies' unfair labor practices.

X

During the period from July 5, 1935, to August 23, 1941, the claimants, in absence of discrimination, would have received from the Companies wages in the total sum of \$1,326,133.99. Since the claimants, during said period (with the exception of employees Lewis DeWitt, Newton J. Pettitt, and Alfred Hatfield, whose interim earnings have not yet been ascertained), had earned the net sum of \$500,709.96 outside of the Companies' employ, their net loss in wages amounts to the sum of \$808,233.38 (subject to appropriate deduction for the net interim earnings of the aforesaid three employees). Under the judicially approved remedy of full back pay, less net earnings, the 209 claimants, from the facts now discovered, are entitled to approximately \$800,000 as restitution for losses sustained because of the Companies' discrimination during the said period from July 5, 1935, to

August 23, 1941. The formula prescribed by the Board was intended to protect the Companies against paying more than they would have paid as wages to the claimants under the circumstances as alleged by them. Apportionment among the claimants of the sum of \$5,400, now claimed by the Companies to be all that they are required to pay under paragraphs 2 (d) and 3 (b) of the Decree, would be less than three-fourths of one percent (.0075) of the loss the Companies had wilfully caused to the 209 claimants during the said 6-year period.⁹

XI

If ultimately put into effect, the remedy herein prescribed, however interpreted, would substantially shift the loss resulting from the Companies' unfair labor practices to the employees discriminated against and relieve the Companies of the major part of their obligation, measured by the actual facts, thereby frustrating the purposes of the Act, impairing the remedial operation of the administrative judicial process created thereby and injuring the important public rights intended to be safeguarded.

XII

In the event that paragraphs 2 (d) and 3 (b) of the Decree should be vacated by this Court in the exercise of its inherent power and sound discretion, and so

⁹ While we disagree with the Companies' interpretation of the formula, we make no contention at this time as to the precise amount of the Companies' total liability under the Board's interpretation. It is sufficient for the purpose of this application that the formula, however construed, provides for substantially less than full restitution.

much of this cause as is affected thereby be remanded to the Board, the Board will for the first time be in a position to consider and, pursuant to its statutory duty, will consider the actual facts in order to prescribe a remedy appropriate to the true conditions. The Board can then correct the gross inequity now discovered and adequately provide for the effectuation of the purposes of the Act and the protection of the public interest.

Wherefore, the Board respectfully requests this Honorable Court:

(a) That the Court issue a Rule to Show Cause, requiring the Companies to file their answer to this petition and to appear before this Court at a time fixed by the Court and show cause, if any there be, why this Court should not vacate paragraphs 2 (d) and 3 (b) of the Decree and remand to the Board so much of this cause as is affected by said paragraphs 2 (d) and 3 (b) of the Decree for further proceedings consistent with the facts now for the first time appearing;

(b) That, upon the return to said Rule, the Court vacate paragraphs 2 (d) and 3 (b) of the Decree and remand to the Board so much of this cause as is affected by said paragraphs 2 (d) and 3 (b) of the Decree for further proceedings;

(c) That the Court grant such other and further relief as may be just and proper and as the nature of this proceeding may require.

Dated at Washington, D. C., this 1st day of February 1943.

H. A. MILLIS,
Chairman.

WM. M. LEISERSON,
Member.

GERARD D. REILLY,
Member.

ROBERT B. WATTS,
General Counsel,

ERNEST A. GROSS,
Associate General Counsel,

HOWARD LICHTENSTEIN,
Assistant General Counsel,

A. NORMAN SOMERS,
WILLIAM J. AVRUTIS,
Attorneys,
National Labor Relations Board.

DISTRICT OF COLUMBIA, ss:

Harry A. Millis, William M. Leiserson, and Gerard D. Reilly, each being first duly sworn, on oath depose and say that they are Chairman and Members of the National Labor Relations Board, respectively, that they have read the foregoing petition and know the contents thereof, and that the statements made therein as upon personal knowledge are true and those upon information and belief they believe to be true.

H. A. MILLIS.

WM. M. LEISERSON.

GERARD D. REILLY.

Subscribed and sworn to before me this 1st day of February 1943.

[SEAL]

JOSEPH W. KULKIS,
Notary-Public, District of Columbia.

My commission expires April 15, 1947.

No. 460

**In the United States Circuit Court of Appeals
for the Eighth Circuit**

**EAGLE-PICHER MINING AND SMELTING COMPANY, A
CORPORATION AND EAGLE-PICHER LEAD COMPANY,
A CORPORATION, PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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EXHIBIT A

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 460 Original—May Term, 1941. Friday, June
27, 1941

EAGLE-PICHER MINING AND SMELTING COMPANY AND
EAGLE-PICHER LEAD COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and on Request for Enforcement
of an Order of the National Labor Relations
Board

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

This cause coming on to be heard upon the petition of Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company to review and set aside and upon the request of the National Labor Relations Board for the enforcement, with certain modifications, of a decision and order of the Board dated October 27, 1939, as amended on December 14, 1939, and the Court, having heard arguments of counsel, being fully advised in the premises, and having on May 21, 1941, handed down its opinion enforcing said order as amended, with the modifications requested by the Board, now, therefore, in conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company, their officers, agents, successors, and assigns, shall jointly and severally:

1. Cease and desist from:

(b) Discouraging membership in International Union of Mine, Mill & Smelter Workers Locals Nos. 15, 17, 107, 108, and 111, or any other labor organization of their employees, or encouraging membership in Tri-State Mine, Mill & Smelter Workers Union, or in the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment because of membership or activity in connection with any such labor organization;

(j) In any other manner interfering with, restraining, or coercing their employees in their exercise of the right to self-organization, to form, joint, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

2. The Eagle-Picher Lead Company, and its officers, agents, successors, and assigns, shall take the following affirmative action which the Board finds will effectuate the policies of the Act:

(c) Offer to the employees named in Appendix C immediate and full reinstatement to, and the person named in Appendix E immediate employment in, their former or substantially equivalent positions, or if no such positions be available then to positions for which

they may be qualified, without prejudice to their seniority and other rights and privileges. All persons, or such number as may be necessary, hired since July 5, 1935, and not in its employ either during the week including May 8, 1935, or during the period between May 8, 1935, and July 5, 1935, shall be dismissed by the Lead Company to provide such employment for the persons above ordered to be offered and who shall accept reinstatement or employment. If, despite and after such dismissal, there is not sufficient employment immediately available for the persons above ordered to be offered and who shall accept reinstatement or employment, all available positions, if any, shall be distributed among such persons, without discrimination against any of them because of their union affiliation or activities, following such a system of employment as has been heretofore applied by the respondent in the conduct of its business or some other non-discriminatory system. Those persons remaining after such distribution for whom no employment is immediately available and those who in accordance with what has been set forth above are reinstated or employed not in their former or substantially equivalent positions, but to positions for which they are qualified, shall be placed by the Lead Company on a preferential list, with priority determined among them in accordance with such system of employment, and thereafter, in accordance with said list, shall be offered reinstatement or employment by the Lead Company in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work;

(d) Make whole all persons listed in Appendix A in the manner set forth above in the said Board's decision and order, as amended, with the limitations in

periods as set forth in parenthesis after the names listed in Appendix A;

* * * * *

3. The Eagle-Picher Mining and Smelting Company, and its officers, agents, successors, and assigns, shall take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to the employees named in Appendix D immediate and full reinstatement to, and to the persons named in Appendix F immediate employment in, their former or substantially equivalent positions, or if no such positions be available then to positions for which they may be qualified, without prejudice to their seniority and other rights and privileges. All persons, or such number as may be necessary, hired since July 5, 1935, and not in its employ either during the week including May 8, 1935, or during the period between May 8, 1935, and July 5, 1935, shall be dismissed by the Mining Company to provide such employment for the persons above ordered to be offered and who shall accept reinstatement or employment. If, despite and after such dismissal, there is not sufficient employment immediately available for the persons above ordered to be offered and who shall accept reinstatement or employment, all available positions, if any, shall be distributed among such persons, without discrimination against any of them because of their union affiliations or activities, following such a system of employment as has been heretofore applied by the Mining Company in the conduct of its business, or some other nondiscriminatory system. Those persons remaining after such distribution for whom no employment is immediately available and those who in accordance with what has been set forth above are reinstated or employed not in their former or substan-

tially equivalent positions, but to positions for which they are qualified, shall be placed by the Mining Company on a preferential list, with priority determined among them in accordance with such system of employment, and thereafter, in accordance with said list shall be offered reinstatement or employment by the Mining Company in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work;

(b) Make whole all persons listed in Appendix B in the manner set forth in the said Board's decision and order, as amended, with the limitations in periods as set forth in parenthesis after the names listed in Appendix B. In the case of W. E. Honeywell, the sum due shall be paid over to Hazel Honeywell, his duly appointed administratrix;

* * * * *

JUNE 27, 1941.

EXHIBIT B

EXTRACT FROM STENOGRAPHIC TRANSCRIPT OF BOARD HEARING. TYPICAL ITEMS OF TESTIMONY ADDUCED BY COMPANIES TO SHOW DIMINISHED EMPLOYMENT OPPORTUNITIES

(Witness JOHN CAMPBELL [Assistant Secretary of Mining Company and in charge of personnel records and employment for said company]).

(By Mr. MADDEN [counsel for the Companies]):

Transcript
page

[6833]

Q. So that when the mines, mill, and smelter started up, after the strike, the companies reverted to the old and regular system of employment and work?

A. Yes, sir.

Q. And the result of that was that the operations conducted under N. R. A. before the strike were conducted by a greatly reduced number of employees?

A. Yes, sir.

[6833]

Q. In addition to N. R. A. swingmen, in order to fill in the N. R. A. system of operations, was it also necessary at Galena to have a number of N. R. A. extras?

A. Yes, sir.

[6834]

Q. Now, of course, the N. R. A. Swingmen's job and the N. R. A. extra's job disappeared with the invalidation of the Act?

A. Yes, sir.

Q. And the result of that was, with no longer any system of spreading the work, that the same operations were conducted with a much reduced force of men?

A. They were.

* * * *

By Mr. MADDEN:

6835] Q. I will ask you if on account of the system of spreading or staggering the work and the inefficiency produced by the N. R. A. operations, the number of men essential to such operations were reduced more than a mere 2/7ths.

A. Yes, sir.

* * * *

By Mr. MADDEN:

6882] Q. Harry C. Beyer: I have him listed as a yardman at the Galena smelter. Is that correct?

A. Yes, sir.

Q. What, if anything, happened to his job?

A. That expired with the invalidation of the N. R. A. He was a N. R. A. swingman on the yard crew.

By Trial Examiner RINGER:

Q. Do you mean by that, Mr. Campbell, that you didn't have a yardman at the Galena smelter?

* * * *

A. Yes; didn't have a swingman.

* * * *

By Mr. MADDEN:

Q. Assuming that this particular claimant, Ernest Bogle, worked a couple of days one

week and 3 days the next week, off and on, was that type of employment continued after the invalidation of the N. R. A.?

A. No, sir.

[6909] MR. MADDEN—W. E. (Mark) Bond.

By Mr. MADDEN:

Q. Is listed here as a machine helper at the Tulsa Quapaw.

Q. In connection with Bond employed at the time of the strike at the Tulsa Quapaw. Was the Tulsa Quapaw mine ever operated after the strike?

[6910] A. No, sir.

Q. By the Company?

A. Not by us.

Q. It was sold?

A. Yes, sir.

[6924] Q. The next claimant is Nick Bratz, listed as a trackman at the Big John mine.

A. Yes, sir.

Q. What, if anything, happened to the job that he was holding at the time of the strike?

A. He was working on the night shift but the night shift was discontinued at that mine.

Q. Never been operated on a night shift since the strike?

A. No, sir.

[6929] Q. The next claimant I have is E. E. Browning, a shoveller at the Bendelari Mine. Is that correct?

A. Yes, sir.

Q. What, if anything, do your records show as to physical disability or incapacity?

A. He has an anomalous condition in the back which bars him from employment under our rules.

Q. When was the Bendelari Mine sold?

A. On June 30, 1936.

Q. And has never been operated by the company, of course, since that time?

A. No, sir.

* * * * *

[6935] By Mr. MADDEN:

Q. The next claimant I have noticed is James O. Bryant listed as a machine helper on the pay roll and a dummy on your personnel sheet. Those are the same things?

A. Yes, sir; those two terms are synonymous.

Q. At the Big John Mine?

A. Yes, sir.

* * * * *

By Mr. MADDEN:

[6936] Q. As to the man James O. Bryant, what, if anything, happened to the job that he was performing?

* * * * *

[6937] A. Well the job ended with the strike because they cut down the work in that drift, reduced the number of machine men considerably in the production from that drift. Mainly development work from then on.

[6945] Q. Archie Bunch at the Bendelari?

A. Shoveller.

Q. And the Bendelari was sold on January 30, 1936?

A. June 30.

Q. June 30, 1936?

[6946] A. June 30, 1936.

Q. R. F. Burgett.

A. He was a machine man at the Tulsa Quapaw Mine.

Q. The Tulsa Quapaw was one of the mines that was never in operation after the strike?

A. Yes, sir.

Mr. AVRUTIS [Board Attorney]. At this point I just want to clarify the record.

By Mr. AVRUTIS:

Q. Although it is true that certain of these mines, the Bendelari for instance, was sold in June of 1936, and apparently the Tulsa Quapaw Mine was not reopened after the strike, it is also true, is it not, Mr. Campbell, that there were other mine workings which were opened for the first time, or let us say, operated for the first time after the strike by the Eagle-Picher Company?

A. Very small.

[6947] Q. But there were?

A. I believe in 1937 a few months the Swalley, I believe with a crew of probably, oh, 15 to 20. And then the D. C. and I think they were both of them for a short time.

By Mr. MADDEN:

[6957] Q. Roy A. Cottongin at Galena?
A. Jumbo furnace man.
Q. And what was his job at the jumbo furnace?

[6958] A. As N. R. A. swingman.

[6962] Q. Everett J. Faries at the Bendelari Mine?
A. He was a mule driver.

Mr. MADDEN: I am omitting reference to the sale from here on, to the sale of the Bendelari on June 30, 1936, and to the fact that the Tulsa Quapaw, Grace B. King Tut, Long-acre, etc., were never operated after the strike.

Trial Examiner RINGER. Well, he has testified to that, and that applies equally to all of them.

[6970] By Mr. MADDEN:

Q. Luke A. Griffitt at the Big John?

A. He was powder man.

Q. And what, if anything, occurred in connection with this man's job after the strike?

A. This man was working at shaft No. 86 and production was discontinued at that shaft after the strike.

[6989] By Mr. MADDEN:

Q. Reck F. Jones at Galena?

A. He was bathhouse man at the time of the strike.

Q. Was his employment continued after the strike?

A. No, sir.

By Mr. AVRUTIS:

Q. Does that mean that the bathhouse was abolished?

A. No; he was an N. R. A. extra-man at the bathhouse. We didn't use as many men at the bathhouse after the strike as we did before. We didn't need as many because the men could work 6 days a week.

* * * * *

[6993] By Mr. MADDEN:

Q. Ben V. Kerney, at the Big John?

A. He was a bumper.

* * * * *

Q. What, if anything, happened to the job that man had at the time of the strike?

A. There was no job that he had filled after the strike.

* * * * *

By Trial Examiner RINGER:

Q. You mean you didn't have any bumpers at all?

A. None at that shaft.

* * * * *

[6994] By Mr. MADDEN:

Q. What happened to shaft 74?

A. They ceased hoisting at that shaft and therefore used no bumpers at shaft 74. The hauling methods were changed.

* * * * *

[7076] Q. At the Big John after the strike, what happened to the bruno men?

A. The bruno men were, I believe, entirely dispensed with in that they put in drags at that mine, and in most instances did away

with shovelers, or used very few shovelers, and no bruno men.

By Mr. AVRUTIS:

Q. They put in drags sometime after the strike?

A. At various times. I think they entirely mechanized that mine.

[7087]

By Mr. MADDEN:

Q. Ora Williams, at the Grace B. Mine?

A. Pumping at the Grace B.

Q. And that mine was never operated after the strike?

A. No.

Q. Raymond Williams, at Galena?

A. N. R. A. clean-up.

Q. He was a swingman as distinguished from an extra?

A. Yes; in that classification.

[7232]

Q. By the way, you mentioned yesterday, and Mr. Newby described the swing crew system at Galena. Except at the Central Mill you didn't have a swing crew system under the N. R. A.?

A. No.

Q. How did you operate and restrict the number of hours per week?

A. We operated the mines 5 days per week.

Q. When I used the term "you" I meant, of course, the mines as distinguished from the other company operations. Upon the invali-

dation of the N. R. A. then and the return to previous methods of operation, you could accomplish the same results with a much reduced crew?

A. Yes, sir.

[7413]

By Mr. MADDEN:

Q. Do you have the date when the South-side Mine shut down?

A. It shut down on January 2, 1936.

Q. Has it ever been operating since?

A. No; I don't believe it has been operated since.

By Mr. AVRUTIS:

Q. It has been operated since?

A. I don't think so unless it was just a very short time.

EXHIBIT C

PERTINENT PORTIONS OF THE BOARD'S DECISION IN WHICH THE BOARD, IN ITS DETERMINATION OF THE ISSUE OF DISCRIMINATION, REVIEWED THE FACTOR OF AVAILABILITY OF EMPLOYMENT AS THE COMPANIES HAD MADE IT APPEAR

(As reported in 16 N. L. R. B. 727)

Page in
16 N. L. R. B.

[735]

III. THE UNFAIR LABOR PRACTICES

* * * * *

[801]

We find, therefore, that the respondents, on July 5, 1935, and thereafter, discriminated against their employees generally in regard to hire and tenure of employment and conditions of employment, thereby discouraging membership in the International and encouraging membership in the Tri-State and Blue Card Union. We further find that by imposing such conditions and thus discriminating against the claimants, the respondents have interfered with, restrained, and coerced their employees in their exercise of the rights guaranteed in Section 7 of the Act.

The respondents, however, urge several considerations in relation to various categories of employees in an attempt to show that such employees were not discriminated against. We have found that the respondents had imposed an illegal condition as against all employees. In claiming, thus,

that certain factors were present which would have precluded some employees from reemployment even in the absence of the illegal condition, the respondents must assume the burden of "disentangling the consequences for which it was chargeable from those from which it was immune."¹³⁴ We have held that the respondents' own conduct made application by the claimants unnecessary. Therefore, it was not until the hearing that the respondents urged, as a basis for certain of the refusals to reinstate, the contentions discussed below. The question is one involving hindsight—whether the respondents would have refused employment to these employees entirely apart from the improper practices which we have found were committed. Where two motives for refusal may have existed, one clearly improper and one a just cause for severance of the employer-employee relationship, and where the improper motive is found to have been present in general, [801] we must require the respondents to adduce clear and convincing proof that the claimants would in any event have been refused reinstatement for proper cause entirely apart from illegal considerations. Applying such general principles, we turn to the consideration of the respondents' special contentions:

¹³⁴ *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862, 872 (C. C. A. 2d, 1937), *cert. den.* 304 U. S. 576 (1938).

[802] (a) *Claimants whose jobs were alleged to have been abolished during the strike.*

The respondents contend that, for various reasons, they reorganized their business during the strike and that as a result, many of the jobs existing on May 8, 1935, were no longer available after the return to work. The evidence shows that certain mines, such as the Tulsa-Quapaw and Grace-B mines, were sold before July 5, 1935, and were not operated by the respondents thereafter; that shortly after the strike, the National Industrial Recovery Act, under which the respondents were operating a 40-hour week, was declared unconstitutional by the United States Supreme Court, and that on resumption of work, the respondents returned to a 48- or 56-hour week, thereby dispensing with many jobs; and that changes in operations after May 8 and before June 15 ended a miscellany of other jobs. The Trial Examiner found that certain employees claimed by the respondents to have been engaged at such jobs on May 8, 1935, were not discriminated against since on and after July 5, 1935, their jobs had been abolished and work was no longer available to them. To these findings and conclusions the International has excepted, and we find merit in such exceptions.

In his testimony, Campbell characterized many of the claimants as "N. R. A. swing men," "N. R. A. extra men," and "extra" men. The characteristic of such "N. R. A." employees was their irregular employment.

In the case of "N. R. A. swing men," although a full 40 hours were worked each week, the men worked on a different shift each day. In the case of "N. R. A. extra men," the work was merely to "fill out" the gaps in continuity, and the men worked when they could. In rebuttal, many of the employees so characterized by Campbell¹³⁸ denied that they were "N. R. A." men or extras.

We do not find it necessary, however, to resolve the difficult issues of whether or not a particular employee was an "N. R. A." or "extra" man, since we are convinced that the label is at least in part fictitious and has no particular significance for purposes of this case. The evidence shows that, prior to May 8, 1935, the choice of employees to be assigned to the extra work required by the N. R. A. was wholly unrelated to ability or seniority. Campbell testified that "N. R. A." crews were made up partly of old employees, partly of new ones put on at the time the N. R. A. so required. Many of the "N. R. A. men" had been employed by the respondents for a long time prior to the N. R. A., and had not been hired to meet its requirements. Nor is there any evidence in the record to show that employees other than the claimants who were engaged in what Campbell called "N. R. A. work" were not employed after the respond-

¹³⁸ Campbell admitted that the term N. R. A. did not appear after the names of the employees in the respondents' records, but claimed that his examination of the records led him to the conclusion as to whether an employee was an N. R. A.

ents resumed operations. It is admitted that the actual type of work done by "N. R. A. men" continued after July 5, and that "extras" were also hired thereafter. Further, the evidence shows that Campbell made out rustling cards for certain of the employees who were claimed to be "N. R. A." and "extra" men when preparations were begun to resume operations.¹³⁷ These cards were, of course, made out on the assumption that those for whom they were issued would work, and that, therefore, work would be available. Campbell testified that the fact that a rustling card was made out meant that a person was "fully entitled" to re-employment, and further that such cards were given, after the plants resumed operation, to every man who applied for them. Campbell stated that he "could not recall a single instance" in which a rustling card was refused until the end of 1935. From his own testimony, then, it affirmatively appears that jobs were available for at least some "N. R. A. men" and "extra."¹³⁸ Finally, it affirmatively appears that Albert Plummer and James Roper, although claimed by the respondents to have been

¹³⁷ The evidence shows that rustling cards were issued for the following claimed "N. R. A. men" or "extras": John Basnett, J. C. Emerson, Luke Patrick, John E. Freeman, James C. Thompson, and Kenneth McNutt.

¹³⁸ The evidence further shows that the respondents maintained the group insurance of many claimed "N. R. A. men" until August 1935, long after the N. R. A. had been invalidated and their jobs had supposedly disappeared.

"extras,"¹³⁹ were reinstated after they had obtained blue cards.¹⁴⁰

Under all the circumstances we do not believe that the respondents have shown that the jobs of these particular claimants have disappeared, but rather only that certain work was curtailed. A legitimate curtailment of work does not, however, necessarily justify exclusion of the claimants from consideration for the jobs remaining. The evidence shows that not actual job disappearance but membership in the International and failure to obtain a blue card were the real reasons for the failure to reinstate this group of men.¹⁴¹

[804]

Similar reasons are applicable to the respondents' contentions concerning the abolition of the jobs of other claimants. We are unable to find that the disposal of the Grace B. Tulsa-Quapaw, or other mines automatically precluded the claimants who

¹³⁹ It is not clear whether the respondents attempted to distinguish between "N. R. A. extras" and ordinary "extras." They apparently contend that either type is precluded from employment. Plummer and Roper were ordinary "extras."

¹⁴⁰ It is also clear that at the Galena plant, which was the chief plant claimed to be affected by "job disappearance," many new processes and operations were begun after resumption of work. When asked by Board's counsel to name such new processes, Joe Newby replied, "Whew! can't do that."

¹⁴¹ Thus, for example, we have found above that in July 1935, Frudenberg told Brooks, one of the alleged "N. R. A. men," that Brooks had "stayed away from his job" too long and had "hung around those 'reds' at Picher." Similarly in November 1935 Newby asked Freeman, who was also an alleged "N. R. A. man," whether Freeman had picketed, and told Freeman that the latter would be given a rustling card if he first obtained a blue card.

worked at those mines from employment. While some mines were closed, other new ones were opened. The evidence abundantly shows that both before and after May 8, 1935, employees shifted from mine to mine. * * * Further, the evidence affirmatively shows that persons other than the claimants who had worked at these mines on May 8, 1935, were given jobs at other mines after the resumption of work. * * *

Concerning other "job disappearances," such as the abolition of the night shift at the Big John, the decrease in the number of machinemen, and the curtailment of operations of shaft 86 of the Big John mine,¹⁴² the evidence is similar. Rustling cards were made out for some claimants although the respondents claimed that their jobs had disappeared; those who were not members of the International or who took out blue cards were given work elsewhere than at the place of their employment on May 8, 1935; and claimants in this category who did apply were refused by supervisory employees who told the applicants they had been too active in the strike or had failed to obtain blue cards.

[805]

Finally as to certain miscellaneous decreases in employment, Campbell's testimony is revealing. He explained that, for example, when the Big John mine reopened, one

¹⁴² There is evidence that this shaft continued in operation, but it is unnecessary to make findings on this issue for reasons herein stated.

less machineman was employed. When asked how he determined that the job thus abolished was the one of the particular claimant, Campbell replied:

In my opinion, the men who reapplied and took the job more or less determined that, and the man who didn't reapply determined whether he had quit or not.

Later, Campbell clarified this by explaining that if one job remained where two had been, whichever former employee applied first got the job, and the job of the remaining employee "disappeared." We have held in a prior case that where an employer by black-listing four employees because of their union leadership led them reasonably to believe that they would not be permitted to return to work and thus caused them to postpone their applications until after the available jobs were filled, it was, under such circumstances, a violation of Section 8 (3) of the Act "to apply the 'first come, first served' principle" to these four men.¹⁴³ We find from Campbell's testimony that in effect the respondents were simply applying a "first come, first served" principle of determining that jobs of the particular claimants had "disappeared" and that the application of such a principle was itself discriminatory.

¹⁴³ *Matter of Mackay Radio & Telegraph Company, a corporation, and American Radio Telegraphists' Association*, 1 N. L. R. B. 201, Board's order enforced, *National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U. S. 333 (1938).

where illegal conditions were present as a condition to reemployment. Under all the circumstances, we find that the respondents have failed to show that the claimants coming within this category would in any event have been refused reemployment, absent illegal conditions.

* * * * *

EXHIBIT D

PERTINENT PORTIONS OF THE BOARD'S DECISION WITH
RESPECT TO THE REMEDY FOUND APPROPRIATE IN
VIEW OF THE COMPANIES' REPRESENTATION AND CON-
TEXTION AS TO PERMANENT CURTAILMENT OF EMPLOY-
MENT OPPORTUNITIES

(As reported in 16 N. L. R. B. 727)

V. THE REMEDY

[831] It is essential in order to effectuate the purposes and policies of the Act that the respondents be ordered to cease and desist from certain activities and practices in which we have found them to have engaged. Further to effectuate the purposes and policies of the Act, and as a means of removing and avoiding the consequences of the respondents' unfair labor practices, we shall, in aid of our cease and desist order, order the respondents to take certain affirmative action, more particularly described below.

[832] We have further found that the respondents on July 5, 1935, discriminated in regard to hire and tenure of employment by discharging and refusing to employ, except upon compliance with an illegal condition, those

[833] of its employees who had gone on strike on May 8, 1935, and were still on strike on said July 5. We have listed in Appendix A all

such employees against whom the respondent Lead Company has thus discriminated. Appendix B is a similar list pertaining to the respondent Mining Company. We shall order the respondent Lead Company to offer reinstatement to their former or substantially equivalent positions to all the striking employees listed in Appendix C, or if no such positions be available, then to positions for which they may be qualified. We shall also order the respondent Mining Company to offer reinstatement to their former or substantially equivalent positions to all the striking employees listed in Appendix D, or if no such positions be available, then to positions for which they may be qualified. We find below that certain persons, listed in Appendices E and F, have obtained regular and substantially equivalent employment but did not testify that they do not desire reinstatement.

* * * We shall, therefore, order all persons listed in Appendices E and F to be offered reinstatement as set out in the preceding and in the following sentences. The offer of reinstatement shall be without prejudice to the employees' former rights and privileges. All or such number as may be necessary, of the employees presently working for the respondents who were hired after July 5, 1935, the date on which the conditions of employment imposed by the respondents became illegal, and whose names do not appear on the pay rolls for the week including May 8, 1935, or were not employed by the respondents during the period between that date and July 5, 1935, shall be dismissed, to provide employ-

[834]

ment for those to be offered and who shall accept reinstatement. If thereupon, despite such dismissal, there is not sufficient employment immediately available for all of said employees to be offered and who shall accept reinstatement, all available positions, if any, shall be distributed among such employees, without discrimination against any employee because of his union affiliation or activities, following such procedure and system of employment as has heretofore been applied in the conduct of the respondents' businesses. Those of such employees for whom no employment is immediately available and those who are reinstated only to positions for which they were qualified but not to their former or substantially equivalent positions, shall be placed on a preferential list and, in accordance with such list, be offered reinstatement in their former or substantially equivalent positions, as such employment becomes available and before other persons are hired for such work.¹⁵²

[834]

In cases where we have found that certain employees were discriminatorily discharged or refused reinstatement, we have ordinarily ordered the offending employer to make them whole with back pay, this being an amount equal to what they would have earned with the employer from the date of the discrimination to the date of reinstatement pursuant to our order, less net earnings elsewhere during the same period. The objective is, of course, to restore the situation, as nearly as possible,

¹⁵² The respondents shall be considered as separate entities for the purposes of this process of reinstatement.

to that which would have obtained but for the illegal discrimination. Our order in the present case is designed to achieve the same objective, but the peculiar factual situation here presents unusual difficulties in fashioning or remedy so as to restore the status quo. Thus, there were approximately 1,100 employees working for the respondents on May 8, and by July 5, 1935, only approximately 600. Of the 500 not working then, some 350 are claimants in this case, and we have found discrimination as to about 200. We have found above that after July 5, 1935, a substantial number of additional men were put to work, but it is apparent from the record that the total pay roll fell a good deal short of the 1,100 figure obtaining before the strike. Thus we have the following situation: had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work, since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of the claimants discriminated against would have returned, but here again, we cannot tell which ones. It does not appear from the record that the respondents followed any set standards, such as seniority, in taking the men back. It does appear that as to most positions, one applicant would be as well qualified as another, since no special skills or abilities are ordinarily necessary. The only discernible standards used seemed to be two: a requirement of a blue card, and "first

come, first served." On this state of the facts, we have no way of knowing which men would have been reinstated had the respondents acted legally—how many non-claimants, how many claimants whose cases we are dismissing,¹⁸³ how many claimants whose cases we are sustaining.

We might with some logic order the respondents to reconsider their course of reinstatements, putting aside the discriminatory factors which they have employed, and to determine now which employees they would have taken back after July 5, 1935, had they been acting legally; back pay would then be due to those of the claimants who would have been called, and nothing would be due to those whom the respondents now decide they would not have reinstated 4 years ago. Among other cogent objections to this procedure is the fact that this determination would be substantially impossible, and the question of back pay would entail endless negotiation and speculation, with attendant delays when a solution of the problems has already been too long delayed. Further, in the light of the whole record, we do not believe that it would effectuate the purposes of the Act thus to permit the determination of the back pay due to rest almost wholly within the discretion of the respondent, with no objective standards available by which a third party could test their

¹⁸³ Our findings above do indicate that some of the claimants whose cases we are dismissing would not have been reinstated—such as those who had filed disability claims against the respondents. But this is not ascertainable as to others—such as those who did not testify at the hearing.

determination. We reject this method, and turn to the only solution that seems fair, workable, and calculated to serve the purposes for which it is intended.¹⁸⁴

A lump sum shall be computed, consisting of all wages, salaries, and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against.¹⁸⁵ The lump sum shall consist of all such monies so paid to such persons during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establishing the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents' pay rolls of May 8, 1935, who applied for work with the respondents, whether successfully or

[836]

¹⁸⁴ In the cases of Sheppard and Ryaon, whom we have found to have been discriminatorily discharged, the ordinary method of computing back pay shall be applied.

¹⁸⁵ If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of

not, after July 5, 1935.¹⁸⁵ Let us assume for purposes of illustration that the lump sum amounts to \$360,000, that there are 200 claimants discriminated against, and that there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus, we assume that two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against. This sum is then to be apportioned among the claimants discriminated against. The portion to be credited to each such claimant will not be the same, since some of the claimants had higher paying jobs with the respondents, and they should receive a proportionately larger share of the lump sum. This proportion is to be computed by dividing the average annual earnings of the particular claimant, when employed by the respondents, by the average annual earnings of

such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum.

¹⁸⁶ We are not including in this computation former employees who did not apply, since as to them, unlike the claimants dis-

all such claimants when so employed.¹⁸⁷ Thus, assuming that the average annual earnings of all the 200 such claimants (still using illustrative figures only) were \$100,000, a particular claimant with average annual earnings of \$500 would be credited with one two-hundredth of the net lump sum, or \$1,200; one with a \$250 average would be credited with but \$600; one with a \$1,000 average would be credited with \$2,400.

[837] After such individual apportionment is made, individual deductions are to be made from the sum credited to each claimant. A deduction applicable to each is the amount of net earnings¹⁸⁸ of the particular individual during the period from July 5, 1935, to the date of his reinstatement or placement on a

criminated against, there is no showing that they refrained from applying because of the blue-card requirement, rather than because of disinterest in reinstatement or other normal reasons. Nor are we including new applicants, since we make the normal assumptions, based here on the respondents' actual practice, that the respondents would generally have taken back those employed by them prior to the strike, in preference to new applicants, had they acted without regard to illegal considerations.

¹⁸⁷ In some cases, such persons had not on May 8, 1935, been employed for a full year. In such a case, the shorter period shall be used as a representative basis for computation of annual earnings. Thus, if an employee had worked for the respondents for only 6 months, earning \$200, his average annual earnings shall be regarded as \$400. In many cases, the employees' annual earnings are listed since 1932. In such instances the annual earnings shall be averaged on the basis of those years. In no case will earnings before 1932 be considered. In all cases where the employees have not worked the entire period since 1932 but have worked for more than a full year, average annual earnings shall be computed on the basis of the full year or years before May 8, 1935.

¹⁸⁸ See footnote 178 above.

preferential list, except for earnings during periods excluded in computing his back pay, as discussed below. These deductions of net earnings are to be made individually from the sums credited to the particular claimant; the net earnings of all the claimants are *not* to be totalled and deducted in lump from the net lump referred to above. The amounts credited to certain claimants are to be subject to further deductions.

Since the Trial Examiner failed to find a violation of Section 8 (3) as to those persons who were alleged to have engaged in violence, those persons who were N. R. A. men, those who had worked at the Tulsa-Quapaw mine or other operations which had been curtailed, and other persons, we shall, in the exercise of our discretion, not require the respondents to reimburse any such employees for the period from the date of the Intermediate Report, August 31, 1938, to the date of our order. Also, since the Trial Examiner recommended that back pay for those persons who had been employed at the Bendelari mine cease on June 30, 1936, we shall exclude the period from August 31, 1938, to the date of our order, from computation. We shall also order a proportionate reduction for the period during which we have found certain persons to have been incapable of work because of ill health or to have been otherwise disqualified for a portion of the time. The periods which are to be excluded are listed in parentheses after the name of each claimant concerned in Appendix A and B. In the case of claimants for whom such periods are to be excluded, the

computation shall be by proportionate reduction of the individual sum otherwise due. The proportion so reduced shall be determined by dividing the total number of days between the date of discrimination and the date of reinstatement or placement on a preferential list less the total number of days excluded in that period by the total number of days between the date of discrimination and the date of reinstatement or placement on a preferential list. This reduction is to be made before the reduction of net earnings. Thus, let us assume that a particular claimant's share of the lump sum, before his net earnings are subtracted, is \$1,200. Let us further assume that 1,500 days have elapsed between the date of discrimination and the date of reinstatement or placement on a preferential list; and that we have excluded the claimant from back pay for a period of 500 days. The sum due him, before subtraction of net earnings, would be two-thirds of \$1,200 or \$800.

[838]

The computation described above shall be made separately for each respondent. The ultimate individual sum arrived at shall be paid, in the case of the respondent Lead Company, to persons listed in Appendix A, and in the case of the respondent Mining Company, to persons listed in Appendix B. In the case of W. E. Honeywell, the sum which would have been due him shall be paid over to Hazel Honeywell, his duly appointed administratrix.

* * * * *

EXHIBIT E: TABLE 1

A COMPARISON OF ACTUAL EMPLOYMENT FOR SPECIFIED WEEKS DURING PERIOD JULY 18, 1935, TO AUGUST 23, 1941, WITH VOLUME OF WEEKLY EMPLOYMENT NECESSARY TO INSURE POSITIONS FOR ALL EMPLOYEES RETAINED AFTER THE STRIKE, FOR ALL CLAIMANTS, AND FOR ALL OTHER OLD EMPLOYEES APPLYING AFTER THE STRIKE¹

EAGLE-PICHER MINING AND SMELTING COMPANY—
TRI-STATE MINES

Week ending	Number of claimants ²	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working ⁴	Number of positions available for claimants (column 6—(3+4)) ⁴
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
7-18-35	80	18	195	293	320	107
7-25-35	80	28	191	299	355	136
8-1-35	80	33	187	300	356	136
8-8-35	80	39	182	301	387	166
8-15-35	80	41	180	301	406	185
8-22-35	80	44	180	304	398	174
8-29-35	80	48	179	307	392	165
9-5-35	80	53	178	311	408	177
9-12-35	80	53	184	317	413	176
9-19-35	80	53	175	310	398	168
9-26-35	80	59	174	313	393	160
10-3-35	80	58	172	310	387	157
10-10-35	80	61	178	319	395	156
10-17-35	80	61	178	319	404	165
10-24-35	80	63	176	319	415	176
10-31-35	80	61	174	315	417	182
11-7-35	80	63	173	316	434	198
11-14-35	80	63	173	316	421	185
11-21-35	79	66	169	314	425	190
11-28-35	79	66	171	316	439	202
12-5-35	79	66	170	315	447	211
12-12-35	79	65	164	308	438	209
12-19-35	79	63	165	307	411	183
12-26-35	79	63	165	307	392	164

Footnotes at end of table.

EXHIBIT E: TABLE 1—Continued

EAGLE-PICHER MINING AND SMELTING COMPANY—
TRI-STATE MINES—continued

Week ending	Number of claimants	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working	Number of positions available for claimants (column 6—(3+4))
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1-2-36	79	64	163	306	371	144
1-9-36	79	61	148	288	347	138
1-16-36	79	61	144	284	351	146
1-23-36	79	60	146	285	350	144
1-30-36	79	61	144	284	346	141
2-6-36	79	61	149	289	360	150
2-13-36	79	60	146	285	368	162
2-20-36	78	61	148	287	364	155
2-27-36	78	63	153	294	378	162
3-5-36	78	59	150	287	363	154
3-12-36	78	60	152	290	366	154
3-19-36	78	59	152	289	370	159
3-26-36	78	59	149	286	358	150
4-2-36	78	59	146	283	370	165
4-9-36	78	59	152	289	351	140
4-16-36	78	61	152	291	354	141
4-23-36	78	62	151	291	350	137
4-30-36	78	62	151	291	343	130
5-7-36	78	62	150	290	344	132
5-14-36	78	61	150	289	334	123
5-21-36	77	62	150	289	352	140
5-28-36	77	62	148	287	322	112
6-4-36	77	62	148	287	337	127
6-11-36	77	62	146	285	326	118
6-18-36	77	62	150	289	334	122
6-25-36	77	57	147	281	324	120
7-2-36	77	58	142	277	335	135
7-9-36	77	52	128	257	261	81
7-16-36	77	49	117	243	255	89
7-23-36	77	48	110	235	268	110
7-30-36	77	48	119	244	265	98
8-6-36	77	47	125	249	272	100

Footnotes at end of table.

EXHIBIT E: TABLE 1—Continued

EAGLE-PICHER MINING AND SMELTING COMPANY—
TRI-STATE MINES—continued

Week ending	Number of claimants	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working	Number of positions available for claimants, (column 6—(3+4))
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
8-13-36	77	53	120	250	269	98
8-20-36	77	53	116	246	260	91
8-27-36	77	53	117	247	258	88
9-3-36	77	51	112	240	246	83
9-10-36	77	50	82	209	180	48
9-17-36	77	51	117	245	262	94
9-24-36	77	51	118	246	259	90
10-1-36	77	51	116	244	263	96
10-8-36	77	50	118	245	275	107
10-15-36	77	51	116	243	266	99
10-22-36	77	50	116	242	258	92
10-29-36	77	50	112	238	258	96
11-5-36	77	49	112	237	242	81
11-12-36	77	50	112	238	246	84
11-19-36	77	50	114	240	249	85
11-26-36	77	50	112	238	249	87
12-3-36	77	51	117	244	254	86
12-10-36	77	51	115	242	257	91
12-17-36	77	50	115	241	253	88
12-24-36	77	50	112	238	245	83
12-31-36	77	50	113	239	255	92
1-7-37					278	
4-15-37					397	
7-1-37					494	
10-7-37					434	
1-6-38					475	
4-7-38					487	
6-30-38					354	
10-6-38					382	
12-29-38					426	
4-6-39					465	
7-6-39					509	
10-5-39					670	

Footnotes at end of table.

EXHIBIT E: TABLE 1—Continued

EAGLE-PICHER MINING AND SMELTING COMPANY—
TRI-STATE MINES—continued

Week ending	Number of claimants ²	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working ³	Number of positions available for claimants (column 6—(3+4)) ⁴
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
12-28-39					637	
4-4-40					785	
7-4-40					838	
10-3-40 ⁵					953	
1-2-41					877	
4-3-41					1,098	
7-3-41					898	
8-21-41					864	

¹ The table refers to production workers only.

² Under the terms of the Board's Order as enforced, certain claimants are to be excluded from consideration for back pay during specified periods. In addition, the number of claimants available varied by reason of death and other causes.

³ Employment at the properties acquired from the Mary M and Commerce Mining and Royalty Companies has not been included.

⁴ Computed by deducting from total actual employment the number of old employees working and the number of old employees not working but applying and available for work. The result represents the minimum number of positions available for claimants since, absent discrimination, the claimants would have shared available employment opportunities with all other old employees applying after the strike.

⁵ From this point on only figures showing the actual extent of employment are given. Examination of the company's records reveals that after this date the number of production workers regularly employed was so great that there could be no question of employment being available at all times thereafter for all claimants.

EXHIBIT E: TABLE 2

A COMPARISON OF ACTUAL EMPLOYMENT FOR SPECIFIED WEEKS DURING PERIOD JULY 18, 1935, TO AUGUST 23, 1941, WITH VOLUME OF WEEKLY EMPLOYMENT NECESSARY TO INSURE POSITIONS FOR ALL EMPLOYEES RETAINED AFTER THE STRIKE, FOR ALL CLAIMANTS, AND FOR ALL OTHER OLD EMPLOYEES APPLYING AFTER THE STRIKE¹

EAGLE-PICHER MINING & SMELTING—GALENA SMELTER

Week ending	Number of claimants ²	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working	Number of positions available for claimants (column 6—(3+4)) ⁴
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
7-18-35	87	40	65	192	147	44
7-25-35	87	55	65	207	185	67
8-1-35	87	55	65	207	196	76
8-8-35	86	58	63	207	199	78
8-15-35	86	57	65	208	201	79
8-22-35	86	58	65	209	217	94
8-29-35	86	57	65	208	214	92
9-5-35	86	58	65	209	218	95
9-12-35	86	58	64	208	217	95
9-19-35	86	58	61	205	200	81
9-26-35	86	57	59	202	186	70
10-3-35	86	57	63	206	207	87
10-10-35	86	58	63	207	213	92
10-17-35	86	59	64	209	227	104
10-24-35	86	59	62	207	215	94
10-31-35	86	59	63	208	228	106
11-7-35	86	59	63	208	236	144
11-14-35	86	59	64	209	247	124
11-21-35	86	59	62	207	249	128
11-28-35	86	59	62	207	249	128
12-5-35	86	58	62	206	250	130
12-12-35	86	57	60	203	226	116
12-19-35	86	57	58	201	198	83
12-26-35	86	57	58	201	200	85

¹Footnotes at end of table.

EXHIBIT E: TABLE 2—Continued

EAGLE-PICHER MINING & SMELTING—GALENA SMELTER—
continued

Week ending	Number of claimants	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working	Number of positions available for claimants (column 2—(3+4))
		Applying and available for work after 7-6-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1- 2-36	86	57	59	202	207	91
1- 9-36	86	57	59	202	196	80
1-16-36	86	56	58	200	193	79
1-23-36	86	56	65	207	216	95
1-30-36	86	57	59	202	218	102
2- 6-36	86	55	60	201	216	101
2-13-36	86	54	53	193	197	90
2-20-36	86	54	55	195	188	79
2-27-36	86	54	57	197	206	95
3- 5-36	86	54	58	198	198	86
3-12-36	86	55	57	198	189	77
3-19-36	86	55	59	200	193	79
3-26-36	86	55	56	197	193	82
4- 2-36	86	56	59	201	214	99
4- 9-36	86	56	60	202	218	102
4-16-36	86	56	59	201	220	105
4-23-36	86	56	59	201	209	94
4-30-36	86	56	57	199	209	95
5- 7-36	86	55	56	197	198	87
5-14-36	86	53	57	196	194	84
5-21-36	86	53	58	197	190	79
5-28-36	86	53	57	196	185	75
6- 4-36	86	53	55	194	192	84
6-11-36	86	53	57	196	214	104
6-18-36	86	50	58	194	208	100
6-25-36	86	52	57	195	194	85
7- 2-36	86	51	54	191	183	78
7- 9-36	86	51	55	192	183	77
7-16-36	86	52	57	195	205	96
7-23-36	86	52	53	191	225	120
7-30-36	86	52	55	193	213	106
8- 6-36	86	52	54	192	220	114
8-13-36	86	52	53	191	227	122
8-20-36	86	51	50	187	220	119

Footnotes at end of table.

EXHIBIT E: TABLE 2—Continued

EAGLE-PICHER MINING & SMELTING—GALENA SMELTER—
continued

Week ending	Number of claimants	All other old employees		Number of persons necessary to give employ- ment to all old employees (total of 2, 3, and 4)	Number of production employees working	Number of positions available for claimants (column 6— (3+4))
		Applying and avail- able for work after 7-5-35	Continu- ously em- ployed dur- ing and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
8 27 36	86	52	53	191	219	114
9 3 36	86	52	51	192	221	115
9 10 36	86	52	53	191	218	113
9 17 36	86	51	51	191	218	113
9 24 36	86	51	51	191	217	112
10 1 36	86	56	56	192	207	109
10 8 36	86	50	55	191	267	102
10 15 36	86	50	53	189	206	103
10 22 36	86	47	53	186	189	89
10 29 36	86	49	51	186	181	81
11 5 36	86	50	52	188	184	82
11 12 36	86	51	52	189	110	87
11 19 36	86	51	51	191	199	94
11 26 36	86	52	51	193	204	97
12 3 36	86	52	51	193	205	98
12 10 36	85	52	51	192	210	103
12 17 36	85	52	51	191	210	104
12 24 36	85	52	51	191	210	104
12 31 36	85	52	51	191	211	108
1 14 37	85	46	56	187	219	117
4 15 37	86	47	55	188	232	130
7 1 37	85	46	52	183	280	182
10 7 37	84	46	52	182	297	199
1 6 38	84	44	50	178	181	87
3 3 38	84	43	50	177	191	98
3 10 38	84	44	49	177	178	85
3 17 38	85	42	48	175	168	78
3 24 38	85	44	50	179	182	88
3 31 38	85	44	50	179	179	85
4 7 38	85	41	48	177	173	81
4 14 38	85	42	43	170	151	66
4 21 38	85	41	45	171	140	54
4 28 38	85	42	46	173	162	74
5 5 38	85	46	46	177	174	82

Footnotes at end of table.

EXHIBIT E: TABLE 2—Continued

EAGLE-PICHER MINING & SMELTING—GALENA SMELTER—
continued

Week ending	Number of claim- ants	All other old employees		Number of positions necessary to give employ- ment to all old employees (total of 2, 3, and 4)	Number of production employees working	Number of positions available for claimants (column 6— (3+4))
		Applying and avail- able for work after 7-5-35	Continu- ously em- ployed dur- ing and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
5-12-38	85	45	45	175	179	89
5-19-38	85	44	45	174	178	89
5-26-38	85	45	45	175	174	84
6-2-38	85	45	45	175	169	79
6-9-38	85	45	47	177	186	94
6-16-38	85	45	49	179	193	99
6-23-38	85	45	49	179	196	102
6-30-38	85	43	52	180	191	99
7-7-38	85	46	52	183	214	116
7-14-38	85	46	52	183	234	136
7-21-38	85	46	53	184	234	135
7-28-38	85	46	53	184	231	132
8-4-38	85	45	53	183	228	130
8-11-38	85	45	51	184	232	133
8-18-38	85	46	53	184	234	135
8-25-38	85	46	53	184	224	125
9-1-38	48	46	51	145	219	122
9-8-38	48	45	50	143	196	101
9-15-38	48	45	49	142	196	102
9-22-38	48	44	49	141	185	92
9-29-38	48	37	48	133	181	96
10-6-38	48	43	48	139	185	104
10-13-38	48	42	48	138	191	101
10-20-38	48	43	48	139	192	101
10-27-38	48	43	48	139	198	107
11-3-38	48	43	49	140	228	136
11-10-38	48	43	49	140	205	113
11-17-38	48	43	48	139	200	109
11-24-38	48	43	48	139	203	112
12-1-38	48	42	46	136	182	94
12-8-38	48	42	48	138	201	141
12-15-38	48	44	49	141	221	128
12-22-38	48	44	49	141	225	132
12-29-38	48	44	49	141	219	126

Footnotes at end of table.

EXHIBIT E: TABLE 2—Continued

EAGLE-PICHER MINING & SMELTING—GALENA SMELTER—
continued

Week ending	Number of claimants ²	All other old employees ³		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working ⁴	Number of positions available for claimants (column 6—(3+4)) ⁴
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
4-6-39					275	
7-6-39					249	
10-5-39					254	
12-28-39					243	
4-4-40					206	
7-4-40					223	
10-3-40					225	
1-2-41					250	
4-3-41					275	
7-3-41					268	
8-21-41					279	

¹ In the interest of economy of presentation, figures are shown at 3-month intervals during the period from January 14, 1937, to March 3, 1938. An examination of the company's records reveals that positions were available for all claimants during this period.

² Under the terms of the Board's Order as enforced, certain claimants are to be excluded from consideration for back pay during specified periods. In addition, the number of claimants available varied by reason of death and other causes.

³ Computed by deducting from total actual employment the number of old employees working and the number of old employees not working but applying and available for work. The result represents the minimum number of positions available for claimants since, absent discrimination, the claimants would have shared available employment opportunities with all other old employees applying after the strike.

⁴ From this point on only figures showing the actual extent of employment are given. Examination of the company's records reveals that after this date, the number of production workers regularly employed was so great that there could be no question of employment being available at all times thereafter for all claimants.

EXHIBIT E: TABLE 3

A COMPARISON OF ACTUAL EMPLOYMENT WITH THE VOLUME OF EMPLOYMENT NECESSARY TO INSURE POSITIONS FOR ALL OLD EMPLOYEES AVAILABLE FOR WORK FOR THOSE WEEKS DURING WHICH THERE WERE LESS PRODUCTION EMPLOYEES WORKING THAN WAS NECESSARY TO INSURE POSITIONS FOR ALL OLD EMPLOYEES

EAGLE-PICHER MINING & SMELTING CO.

Week ending	Number positions necessary to give employment to all old employees	Number of production employees working	Number of positions necessary but not available	Percentage of necessary employment actually available
(1)	(2)	(3)	(4) (2-3)	(5)
Tri-State Mines:				
9-10-36	209	180	29	86
Galena:				
7-18-35	192	147	45	77
7-25-35	207	185	22	89
8-1-35	207	196	11	95
8-8-35	207	199	8	96
8-15-35	208	201	7	97
9-19-35	205	200	5	98
9-26-35	202	186	16	92
12-19-35	201	198	3	99
12-26-35	201	200	1	99
1-9-36	202	196	6	97
1-16-36	200	193	7	97
2-20-36	195	188	7	96
3-12-36	198	189	9	95
3-19-36	200	193	7	97
3-26-36	197	193	4	98
5-14-36	196	194	2	99
5-21-36	197	190	7	96
5-28-36	196	185	11	94
6-4-36	194	192	2	99
6-25-36	195	194	1	99
7-2-36	191	183	8	96
7-9-36	192	183	9	95
10-29-36	186	181	5	97
11-5-36	188	184	4	98

EXHIBIT E: TABLE 3—Continued

EAGLE-PICHER MINING & SMELTING CO.—continued

Week ending (1)	Number positions necessary to give employment to all old employees (2)	Number of production employees working (3)	Number of positions neces- sary but not available (4) (2-3)	Percentage of necessary employ- ment actually available (5)
3-17-38	175	168	7	96
4-7-38	177	173	4	98
4-14-38	170	151	19	89
4-21-38	171	140	29	82
4-28-38	173	162	11	94
5-5-38	177	174	3	98
5-26-38	175	174	1	99
6-2-38	175	169	6	97
Total	6,359	6,941		
Average percentage of necessary employment actually avail- able				95

EXHIBIT F

A COMPARISON OF ACTUAL EMPLOYMENT FOR SPECIFIED WEEKS DURING PERIOD JULY 18, 1935, TO AUGUST 23, 1941, WITH VOLUME OF WEEKLY EMPLOYMENT NECESSARY TO INSURE POSITIONS FOR ALL EMPLOYEES RETAINED AFTER THE STRIKE, FOR ALL CLAIMANTS, AND FOR ALL OTHER OLD EMPLOYEES APPLYING AFTER THE STRIKE¹

EAGLE-PICHER LEAD COMPANY—JOPLIN SMELTER

Week ending	Number of claimants ²	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working	Number of positions available for claimants ³ (column 6—(3+4)+1)
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
7-23-35	42	20	154	216	291	117
10-3-35	42	27	154	223	321	140
12-19-35	42	28	74	144	276	174
3-5-36	42	28	148	218	281	105
5-21-36	42	29	144	215	280	107
8-6-36	41	29	145	215	287	113
10-15-36	40	28	141	209	309	140
12-31-36	40	29	140	209	302	133
3-23-37	40	26	139	205	320	155
7-1-37	40	27	137	204	325	161
10-26-37	40	27	129	196	270	114
1-6-38	40	27	119	186	231	85
4-7-38	40	26	119	185	220	75
6-30-38	40	25	116	181	216	75
10-6-38	39	23	113	175	208	72
12-29-38	39	24	112	175	198	62
4-6-39	39	25	112	176	205	68
7-6-39	39	24	109	172	261	128
10-5-39	39	24	108	171	281	149
12-28-39	40	23	103	166	277	151

Footnotes at end of table.

EXHIBIT F—Continued

EAGLE-PICHER LEAD COMPANY—JOPLIN SMELTER—CON.

Week ending	Number of claimants ¹	All other old employees		Number of positions necessary to give employment to all old employees (total of 2, 3, and 4)	Number of production employees working ²	Number of positions available for claimants (column 6—(3+4)) ³
		Applying and available for work after 7-5-35	Continuously employed during and after the strike			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
4-4-40					310	
7-4-40					326	
10-3-40					323	
1-2-41					319	
4-3-41					302	
7-3-41					325	
8-21-41					365	

¹ In the interest of economy of presentation, figures are shown at 3-month intervals. An examination of the company's records reveals that positions were available for all claimants at all times. The table refers to production workers only.

² Under the terms of the Board's Order as enforced, certain claimants are to be excluded from consideration for back pay during specific periods. In addition, the number of claimants available varied by reason of death and other causes.

³ Computed by deducting from total actual employment the number of old employees working and the number of old employees not working but applying and available for work. The result represents the minimum number of positions available for claimants since, absent discrimination, the claimants would have shared available employment opportunities with all other old employees applying after the strike.

⁴ From this point on only figures showing the actual extent of employment are given. Examination of the company's records reveals that after this date the number of production workers regularly employed was so great that there could be no question of employment being available at all times thereafter for all claimants.

(Order permitting respondent's petition for rule to show cause, etc., to be filed and requiring petitioners to file answer, etc.)

Respondent has heretofore presented to the court a "petition for rule to show cause, to remand, and for other relief." The matter has been treated as a request for leave to file a petition in the nature of a bill of review, and at the suggestion of the court notice was given by respondent to petitioners of the presentation of the application. Petitioners appeared specially and challenged the jurisdiction of the court and its right or authority to entertain or take any action with respect to the petition.

The court has concluded that as a matter of orderly procedure the petition should be permitted to be filed and petitioners should be required to make formal answer thereto.

It is therefore ordered that respondent's petition for rule to show cause, to remand, and for other relief be permitted to be filed; that petitioners be required to file answer thereto on or before September 20, 1943; and to serve a copy thereof on respondent at Washington, D. C., on or before said date, service being permitted to be made by registered mail; that copy of this order and of respondent's petition be served upon each of petitioners on or before August 20, 1943, service being permitted to be made by registered mail; and that, after the filing of petitioners' answer, such further proceedings shall be had as the court may direct.

August 9, 1943.

(Motion for leave to file Joint and Several Plea to Jurisdiction, etc.)

Come now petitioners and show to the court that on August 9, 1943, they were required to file formal answer to the pleading of respondent entitled "Petition for Rule to Show Cause, to Remand, and for Other Relief". They submit herewith their pleading entitled "Joint and Several Plea to the Jurisdiction, Motion to Dismiss, Demurrer, and Answer of Petitioners to Respondent's Petition for

Rule to Show Cause, to Remand, and for Other Relief." They move the court for an order authorizing the filing of such pleading without waiver of any defense, jurisdictional or otherwise, therein interposed.

Wherefore, petitioners, jointly and severally, move, reserving all exceptions to said order of August 9, 1943, that said pleading may be forthwith filed, that it may be adjudged a complete compliance with the order aforesaid, and that neither the plea to the jurisdiction, the motion or demurrer therein contained, or the answer therein appearing, shall be deemed as a waiver of the other or others; and that each may at all times be adjudged without such claim or assertion of waiver.

A. C. Wallace,
Miami, Okla.

H. W. Blair,
Tower Building,
Washington, D. C.

John G. Madden,
Fidelity Bldg.,
Kansas City, Mo.

James E. Burke,
Fidelity Bldg.,
Kansas City, Mo.

(Endorsed): No. 460, Orig. Filed in U. S. Circuit Court of Appeals on Sept. 20, 1943.

(Order granting Leave to file Joint and Several Plea to Jurisdiction, Motion to Dismiss, Demurrer and Answer to Respondent's Petition for Rule to Show Cause, to Remand, and for other Relief.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 460, Orig. — September Term, 1943.

Tuesday, October 5, 1943.

Eagle-Pitcher Mining and Smelting Company, a Corporation, and Eagle-Picher Lead Company, a Corporation, Petitioners,

vs.

National Labor Relations Board.

On Petition for Rule to Show Cause.

On consideration of the Motion of petitioners for leave to file "Joint and Several Plea to the Jurisdiction, Motion to dismiss, Demurrer, and Answer of Petitioners to Respondent's Petition for Rule to Show Cause, to Remand, and for Other Relief.", which Pleading is submitted with the Motion, It is Ordered by the Court that said Pleading may be filed forthwith.

October 5, 1943.

JOINT AND SEVERAL PLEA TO THE JURISDICTION, MOTION TO DISMISS, DEMURRER, AND ANSWER OF PETITIONERS TO RESPONDENT'S PETITION FOR RULE TO SHOW CAUSE, TO REMAND, AND FOR OTHER RELIEF.

Come now petitioners, jointly and severally, in compliance with the order of this court of August 9, 1943, but reserving any and all exceptions thereto, together with their right to amend or supplement this pleading, and plead as follows:

I.

Petitioners, jointly and severally, enter special appearance only, and challenge the jurisdiction of the court, and its right, power or authority to entertain, or to take any action in, this attempted proceeding. This denial of the jurisdiction of the court, together with such reservation of jurisdictional rights, is based upon the following facts of record: The final decree in this cause was entered on July 2, 1941, at the request, and at the instance of respondent, and over the vigorous opposition of petitioners. Thereafter the then Term of this court duly terminated. Petitioners, and each of them, duly complied with the provisions of said decree. Upon February 4, 1943, at a subsequent term of this court respondent for the first time sought to initiate the instant proceeding, wherein it is prayed by respondent that such decree be vacated in part only. The decree in question was an affirmance of the order of respondent with modifications requested by respondent. The facts purported to be alleged by respondent are insufficient to justify the relief prayed. Thereunder, this court is without jurisdiction, power or authority to act in the premises.

II.

Petitioners, jointly and severally, aver that the purported facts alleged in the petition of respondent are insufficient to justify the relief prayed, and fail to state a cause of action. Thereunder, the relief prayed and the leave sought, should be denied, and the proceeding dismissed.

III.

Petitioners, jointly and severally, answering the allegations of the petition filed by respondent, but reasserting the defenses heretofore interposed, without abandonment or waiver thereof, and filing the ensuing answer only under compulsion of the order of this court, state:

(1) They admit, as charged, that a hearing was held before a Trial Examiner of the Board from December 6, 1937 to April 28, 1938; that thereafter, and on October 27, 1939, the Board issued its order against petitioners, and that on July 2, 1941, this court duly entered its decree enforcing the order of the Board as modified pursuant to the requests of the latter. The provisions of such decree appear in the original records of this court and, so appearing, are admitted.

(2) They deny that, upon the hearing or thereafter, or at any other time, inadvertently or otherwise, they, or either of them, withheld from the Board material facts peculiarly within their knowledge concerning the employment situation existing in the enterprises involved in the complaint in question. They further deny that at any time by evidence or representations they, or either of them, induced the Board mistakenly to conclude that an unusual condition existed, or that the customary or normal remedy of full back pay to each employee allegedly discriminated against was inapplicable, or that a special remedy should be devised to conform to a state of conditions which in fact did not exist; and further deny that the Board was unaware of the true facts existing. Petitioners further deny that the remedy devised by the Board is unsuited, grossly or otherwise, to the actual situation existing prior to and since the hearing. Petitioners further deny that such remedy deprives said employees of due compensation or that equity, public policy or the integrity of the administrative-judicial process require its correction. Petitioners further deny that such considerations, or

any other, in law or in fact, warrant setting aside any provision or provisions or decree of this court or a remand to the Board of so much of this cause as is affected thereby for the purpose of framing a new remedy allegedly suited to the facts now averred by the Board.

(3) They admit that a complaint was filed by the Board charging discrimination on and after July 5, 1935. The substance of that complaint is a part of the records of this court. They deny that they, or either of them, had unique or peculiar knowledge of their operations or the conditions affecting reemployment. They admit that between May 8, 1935 and July 5, 1935 operations were reorganized with the result that fewer employees were required. They admit that they introduced evidence showing that certain mines were sold, certain operations in other mines were suspended, and certain jobs were eliminated and abolished. Petitioners deny, however, that they sought to show, or purported to show, or introduced evidence to show, that at all times in the future employment opportunities at their properties would be substantially curtailed, or, more specifically, that at all times after July 5, 1935, there had been and would be less than sufficient work to afford employment to the claimants in said proceeding. The proof actually introduced by petitioners is incorporated in the records of this court. Petitioners further deny that they, or either of them, affirmed or repeated any representation or contention that available work was insufficient for all claimants in exception to the report of the Trial Examiner or otherwise. Such exceptions appear as part of the records of this court.

(4) They admit that on October 27, 1939, the Board issued its order and purported to find proof of discrimination. Petitioners, however, deny that there was evidence of such discrimination or that they, or either of them, had discriminated against the claimants, or any of them. The provisions of said order issued by the Board, and affirmed by decree of this court, are a part of the records of this court.

(5) They are without information as to the matters considered by the Board on the issue of reimbursement to the claimants for alleged wage losses, and therefore deny the allegations of the Board relating thereto. They are without information as to the allegation, and there-

fore deny, that normally the Board would have directed payment of back pay in full to be made to each claimant from the date of discrimination to the date of offer of reinstatement or placement on a preferential rehiring list, but state, however, that the provisions of the National Labor Relations Act do not provide for such allegedly normal action of the Board. Petitioners further deny that their proof had shown conclusively that employment opportunities had been primarily and substantially curtailed subsequent to July 5, 1935, or that the Board, necessarily or otherwise, credited any representation or contention that at all times thereafter there were and would continue to be fewer positions available than normally would provide for the combined number of claimants and re-applicants, or that any such proof, representation or contention was at any time made by petitioners or either of them. The actual findings and order of the Board appear as part of the records of this court, as does the proof offered by petitioners. As a result petitioners tender for the consideration of this court the substance of such records in lieu of the argumentative assertions and allegations of respondent. Petitioners further deny that respondent is entitled to assert, or justified in asserting its secret assumptions, considerations or consultations, but aver that all such assumptions, considerations and consultations were and are merged in the final order of the Board enforced by the decree of this court; and that such final order, as so enforced, constitutes the only source to which respondent may make reference as the basis of its considerations, conclusions or consultations. Respondent speaks only through and by its orders, findings and decrees. Petitioners deny that the Board understood, or that petitioners, or either of them, represented, that only on rare occasions and for brief periods had there been or would there be available jobs equal to or in excess of the total number of claimants and reapplicants. Petitioners are without information as to the allegation, and therefore deny, that the Board was satisfied from ostensible circumstances that the entire situation would be adequately provided for under its order, or that such was the reason for its failure to provide for full back pay. Petitioners further deny that the Board departed from the normal and usual remedy of full back pay to each claimant, or that such was or is the normal and usual remedy, or that the Board relied upon any

representation of petitioners, or either of them, as to the existence of insufficient employment to provide normally for all claimants, or that any such representation was made. Petitioners further state that no such representation was made at any time by them, or either of them, to the Board, or otherwise.

(6) They deny that they, by any petition to review, realigned, reaffirmed or made any representation or contention as to the diminution of employment opportunities available for the claimants, or that the Board was thereby misled into adhering to any assumption that opportunities for employment of the claimants had been permanently curtailed, or that the prescribed remedy in the order of respondent was appropriate or did not require revision. To the contrary, petitioners asserted that the remedy of the Board was speculative, arbitrary, conjectural and based otherwise than upon evidence in the record.

(7) They admit that the decree of this court was entered on July 2, 1941, as shown by the records of this court. The basis for the entry of the decree appears from the opinion of this court of May 21, 1941 and the substance of such decree. They admit that on August 23, 1941, petitioners, pursuant to the decree, offered reinstatement to the claimant, and therefore, then, or thereafter, fully complied with the decree as entered.

(8) They state that, immediately upon the entry of the decree, they proceeded to make appropriate computations thereunder to determine the amount and allocation of the back pay award. Thereafter, repeatedly, they sought conferences with representatives of the Board to determine the method of such computation, the inclusion or exclusion of certain after-acquired properties in connection therewith, and consideration of other elements pertinent thereto. Representatives of the Board consistently and adamantly declined to discuss any matter relating to the computation of the back wage award or the allocation of the benefits thereof. As a result petitioners eventually made such computation and tendered the full amount due under the award. Such tender was made prior to institution of this proceeding. Petitioners further admit that all payrolls and records of petitioners were made subject to investigation by the Board, and were investigated. They deny that any new or different information was thereby known to, or acquired by the Board.

They further deny that such records disclose that on or after July 5, 1935, petitioners were in a position to accord full employment to all claimants and to all reapplicants available for work. Petitioners, however, specifically deny that they, or either of them, at any time represented that their employment opportunities were insufficient for the total number of claimants or for the total number of claimants and available reapplicants, or that any information with reference thereto was in any manner suppressed or concealed. All information was at all times available to the Board.

(9) They deny that upon the institution of this proceeding it appears for the first time, or is the fact, that absent discrimination (which each petitioner denies) each claimant normally would have been accorded full employment or would have earned full wages, or that the petitioners should have been required to reimburse fully each such employee. Petitioners, and each of them, further deny that the remedy of the Board, enforced by this court, is grossly inequitable or was based directly or indirectly upon any representation or contention of petitioners or either of them. To the contrary, all facts were available to the Board at all times.

(10) They deny that from July 5, 1935 to August 23, 1941, the claimants would have received from petitioners, absent discrimination, which petitioners and each of them deny, the sum of \$1,326,133.99, or any other sum, or that the net sum of interim earnings elsewhere was only \$500,709.96, or that the net loss in wages to the claimants amounts to the sum of \$808,233.38, or any other sum. They further deny that the remedy of full back pay is required under the National Labor Relations Act, or is judicially approved, or that the claimants are entitled to approximately \$800,000.00 as restitution, or to any other sum. Petitioners assert that the remedy devised by the Board was equitable under the facts found, was not the result of any representation or assertion of petitioners, and was incorporated in the order of the Board with a full knowledge of the facts, without concealment by petitioners, and with all facts and records at all times available to the Board as the basis for its determination.

(11) They deny that the remedy herein prescribed would shift the loss, substantially or otherwise, from unfair labor practices on the part of petitioners to claimants.

or relieve petitioners of the major part of the obligation, or that the purposes of the National Labor Relations Act would be frustrated, or that the remedial operation of the administrative judicial process would be impaired, or that important public rights would be injured.

(12) They deny that this decree, or a part thereof, could or should in law be vacated or remanded to the Board for the prescription of a new remedy, or otherwise modified or invalidated.

(13) Petitioners, in opposition to this proceeding, further affirmatively state:

Thereby the successful litigant seeks to vacate *in part* the favorable decree which it induced this court to enter. With that decree, in its entirety, petitioners have complied. As a result no restoration of the *status quo* is possible. With the lapse of time, moreover, the rights of petitioners have been irretrievably lost. The only professed purpose of the proceeding is to authorize a successor Board to revise the discretionary remedy of its predecessor in order to render it more onerous against petitioners. Exercise of that discretion had in the meantime become a finality by judgment. Petitioners allege that, during the hearing, not only were no representations made as charged, but that full information was available to the Board, and all records of petitioners were made available to counsel for the Board. Petitioners further aver that they submit herewith to this court (fully reserving the rights hereinbefore specified) the complete record of this cause for its consideration. They adopt herewith (as Exhibit A) their brief heretofore filed with this court, and therefore a part of the records thereof, with particular reference to the statements of fact predicated upon the records of this court therein contained.

(14) Petitioners further state that respondent is estopped, having accepted the benefits of the decree, from any attempt now to vacate that decree in part. Since, moreover, all proof now relied upon by respondent was at all times available and subject to its examination and scrutiny, it is not only estopped to rely thereon but is barred by laches from any attempt to do so. Neither allegation nor proof of reasonable diligence on the part of respondent is or can be shown. No fraud is charged or

under the proof chargeable. No accident or mistake appears. No newly discovered evidence, suppressed or concealed or otherwise unknown to respondent by reasonable diligence, is disclosed. Full knowledge of the actual facts on the part of respondent is shown. Petitioners state that no rational basis for the filing or reception of a bill of review is revealed by allegation or proof.

Wherefore, reserving all rights heretofore specified, petitioners pray that the request for leave to file a petition in the nature of a bill of review be denied, and this proceeding dismissed.

A. C. Wallace,
Miami, Okla.

H. W. Blair,
Tower Bldg.,
Washington, D. C.

John G. Madden,
Fidelity Bldg.,
Kansas City, Mo.

James E. Burke,
Fidelity Bldg.,
Kansas City, Mo.

State of Missouri, County of Jackson.—ss.

James E. Burke, of lawful age, being first duly sworn upon his oath, states that he is attorney and agent for the Eagle-Pitcher Mining and Smelting Company, a corporation, and Eagle-Pitcher Lead Company, a corporation, petitioners in the above-entitled case, and makes this affidavit for and on behalf of said petitioners, being lawfully authorized so to do.

Affiant further states that he has read the foregoing petition and is familiar with the contents thereof and that the statements therein contained are true.

James E. Burke.

Subscribed and sworn to before me this 18th day of September, 1943.

(Seal)

Harry Wellington,
Notary Public, in and for
Jackson County, Missouri.

My Commission Expires April 20, 1947.

(Endorsed): No. 460, Orig. Filed in U. S. Circuit Court of Appeals on Oct. 5, 1943.

No. 460, Original

**In the United States Circuit Court of Appeals
for the Eighth Circuit**

EAGLE PICHER MINING AND SMELTING COMPANY, A CORPORATION,
AND EAGLE PICHER LEAD COMPANY, A CORPORATION,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR RULE TO SHOW CAUSE, TO REMAND, AND FOR
OTHER RELIEF

**MOTION OF NATIONAL LABOR RELATIONS BOARD FOR
JUDGMENT AS REQUESTED IN PETITION**

ROBERT B. WATTS,

General Counsel,

National Labor Relations Board,

Washington, D. C.

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NATIONAL LABOR RELATIONS BOARD

**In the United States Circuit Court of Appeals
for the Eighth Circuit**

No. 460, ORIGINAL

**EAGLE PICHER MINING AND SMELTING COMPANY, A CORPORATION,
AND EAGLE PICHER LEAD COMPANY, A CORPORATION,
PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR RULE TO SHOW CAUSE, TO REMAND, AND FOR
OTHER RELIEF**

**MOTION OF NATIONAL LABOR RELATIONS BOARD FOR
JUDGMENT AS REQUESTED IN PETITION**

Now comes the National Labor Relations Board, hereinafter referred to as the Board, and, upon the Petition, Answer, the record in the original proceeding, and the admissions of the Eagle Picher Mining & Smelting Company and Eagle Picher Lead Company, hereinafter called the Companies, moves the Court for judgment granting the relief prayed for in the Board's petition, to wit, vacating paragraphs 2 (d) and 3 (b) of the decree, and remanding to the Board so much of the cause as is affected by said paragraphs for further proceedings consistent with the facts now appearing. This motion is brought on the ground that the Companies have failed effectively to controvert any material allegation of the Board's petition or raise any valid defense thereto, and, hence, their answer raises no genuine issue of fact in respect to any material allegation of the petition, as appears below:

1. On or about February 4, 1943, the Board presented to the Court its petition for a Rule requiring the Companies to show

cause why paragraphs 2 (d) and 3 (b) of the decree heretofore entered by the Court should not be vacated, and why so much of this cause as is affected thereby should not be remanded to the Board for further proceedings consistent with facts now for the first time appearing. Counsel for the Companies challenged the Court's power to take any action in respect to the petition, and the Court thereupon heard oral argument and received the briefs of the parties. On August 20, 1943, the Court issued its order granting the Board leave to file its petition and requiring the Companies to file their answer thereto. The Companies thereafter filed a pleading which, in addition to their answer, included, under leave later given by the Court, a plea to the Court's jurisdiction and a challenge to the sufficiency of the petition.

2. The facts alleged in the petition of the Board are substantially as follows (P. II-XII):¹ Prior to December 6, 1937, the Board had issued a complaint in which the Companies were charged with the commission of unfair labor practices, including a refusal to reinstate striking employees on July 5, 1935, and thereafter. In connection with proceedings had pursuant to said complaint, the Companies withheld from the Board material facts peculiarly within their own knowledge regarding employment conditions. They misled the Board and, by evidence and representation, induced it mistakenly to conclude that an unusual condition existed in that at all times from July 5, 1935, there were and would be less than sufficient positions than were normally distributable among the claimants and, hence, that the normal remedy of full back pay was inapplicable. In consequence of the Companies' actions, and in reliance upon its representations, the Board, moved to believe that it was dealing with a state of conditions which did not in fact exist, ordered and devised a special remedy markedly inequitable and grossly unsuited to the actual situation, the said remedy contained in the Board's order being subsequently enforced by paragraphs 2 (d) and 3 (b) of the Decree. The true

¹ The symbols "P. —" and "A. —" followed by Roman numerals, refer, respectively, to the appropriate paragraphs of the Board's petition and the Companies' answer. In the Board's briefs the references to the Petition (by Arabic numerals) are to pages.

situation as to employment, contrary to that represented by the Companies in the original proceeding, was discovered by the Board for the first time in an examination, completed in October 1942, of the Companies' pay roll and records, made in an investigation to determine whether the Companies had complied with the Decree.

The Board further alleged that these considerations warranted the setting aside of paragraphs 2 (d) and 3 (b) of the Decree and the remand to the Board of so much of the cause as is affected thereby for the purpose of framing a remedy suited to the actual situation now discovered to have existed at all times.

3. The allegations of the petition were supported by:

(a) Pertinent extracts from the record in the original proceeding showing the nature of the evidence adduced and of the contentions advanced by the Companies in regard to the availability of employment (P. III, VI; App. 6-14);²

(b) Findings in the Board's decision demonstrating that the Board relied upon the Companies' representations and that it departed from its normal practice on the basis thereof (App. 15-23, 24, 33), and

(c) Compilations made in 1942 from the Companies' pay rolls and records, which disclosed for the first time the actual facts in regard to employment availability (App. 34-46). These facts were contrary to the representations made by the Companies and relied upon by the Board in the original proceeding.

The Companies admitted, both upon the oral argument (R. Br. 46)³ and in their brief in opposition to the application for the Rule, that during the entire period of discrimination there was sufficient normally distributable employment to provide for all of the claimants (Co. Br. 4-5, 26, 27, 33, 34, 40, 49,

² The symbol "App." refers to the pages of the separately bound appendix containing the exhibits referred to in the Board's petition.

³ Because the briefs filed by the Board on the application for the issuance of the Rule are fully in point on all matters raised by this motion, the Board herewith submits, in support of this motion, printed copies of those briefs in a single bound volume. The symbols "M. Br." and "R. Br." refer, respectively, to the pages of the Board's main brief and reply brief. The symbol "Co. Br." refers to the pages of the Companies' brief.

59).²⁴ The Board in its reply brief (R. Br. 60) stated that these admissions "have made it possible for the Court to reach a determination upon the Board's petition, once the Companies' answer is filed, without need to take 'evidence aliunde'." The pleading which the Companies filed full confirms this statement.

In their plea to the jurisdiction of the Court (A. I) and their challenge of the sufficiency of the petition (A. II), the Companies raise contentions which they made in their brief on the application for the Rule (Co. Br. 44-49; 58-64) and were fully treated in the Board's briefs and therein shown to be without merit (M. Br. 14-36; R. Br. 57-59).

In their answer (A. III), the Companies make purely formal denials of certain material allegations of the petition (P. II-XII, A. III (2) to (12)). These denials are patently sham, and insubstantial in character, and raise no genuine issue of fact. This is manifest from the admissions in the Companies' brief which they expressly incorporate as part of their answer (A. III (13)), from the record in the original proceeding which is likewise made a part of the answer (A. III (13)), and from the uncontroverted supporting data in the Board petition and appendix, all of which conclusively establish the allegations in the Board's petition. The Companies' defenses (A. III (13), (14)) are repetitions of matters set forth in their brief, and are treated and answered by the Board in its main and reply briefs (M. Br. 14-36; R. Br. 46-60).

6. The following analysis discloses that the Companies have failed effectively to deny any of the material allegations of the petition or raise any valid defense thereto:

(a) The petition of the Board alleges (P. II, III, V, VI) that at the hearing before it and thereafter, the Companies, in connection with the charge that they had discriminated against striking employees by refusing to reemploy them upon resumption of previously suspended operations, sought to show and did show conclusively that at all times after July 5, 1935, employment opportunities at their properties had been and would continue to be substantially less than they had been when last operated prior to said date, and, as a necessary consequence,

²⁴ The Companies incorporate as part of their Answer (A. III (13)) the brief filed by them on the application for the Rule.

that at all times thereafter, there had been and would be less than sufficient normally distributable work for all claimants. The Companies deny this allegation (A. II, III, V, VI). However, the denial is nullified by the unimpeached record data which show that the Companies did make the representations as alleged. Thus the Companies admit that at the hearing they adduced evidence of the sale of mines, suspension of operation of other mines, reduction in size of crews, and the elimination of specific jobs (P. III; A. III (3), App. 6-14). It is a matter of record and they cannot deny that on the basis of the evidence so adduced, they contended before the Board, in their exceptions to the Trial Examiner's recommendation that claimants be made whole for wage losses suffered on account of the discrimination, that "said recommendation as to each of said persons ignores . . . that there is no evidence that said person's former employment or any employment with respondents . . . was available on and after July 5, 1935 . . . that the former employment of said person has been discontinued and is no longer available . . . [and] ignores the evidence of [the Companies'] requirements and availability of work . . ." (P. III). They cannot deny that in their exceptions filed with this Court in the proceeding to review the Board's order, they repeated these contentions in identical terms (P. VI). Further demonstrating the intention of the Companies to induce a finding of lasting insufficiency of available positions for claimants and other old employees seeking reemployment, are the statements of Companies' counsel made for the record in his oral argument at the close of the hearing before the Trial Examiner (R. 13925, *et seq.*). The Companies later filed the transcript of this oral argument with the Board as their brief in support of their exceptions to the Trial Examiner's recommendations, and, after issuance of the Board's order, filed it with the Court as part of the record of the review proceedings. In this oral argument, counsel referred to the Companies' policy "to employ so far as possible only former employees" (R. 13939),* and averred that pursuant thereto, "of all the men employed in July 1935, over 90 percent . . .

* This statement was expressly credited by the Board in its decision (App. 30, p. 186).

were the men who worked at the time of the strike * * * on May 8, 1935" (R. 13940). The Companies thereby clearly represented that of the total of approximately 600 persons employed on July 5, 1935 (App. 27), only 10 percent or about 60 were new employees and, hence, that a maximum of 60 positions were all that could possibly have been distributed among the claimants and other old employees then applying for re-employment (herein termed reapplicants).⁵ Counsel for the Companies stressed that this condition of severe contraction of employment opportunities for claimants and reapplicants was a lasting one. He stated, "Mines are closing daily. The future of an industry is in the balance" (R. 13926).

Plainly, by their evidence and contentions, the Companies were seeking to induce the Board to find that there was no position available for any claimant or that there were so few jobs remaining that it was impossible to say which claimant, even if there had been discrimination against the claimants as a class, was denied reinstatement and therefore lost any wages by reason thereof. This is confirmed in the Companies' brief before the Court on petition for review. There, (pp. 122-123) they characterized as "speculative" the claim of each claimant on the ground that it was impossible to demonstrate that "any particular claimant could under any circumstances have been reemployed" and hence there was no proof "that any particular claimant lost a dollar in wages on account of any claimed discrimination." Thus, the fact that the Companies did represent that there had been a lasting curtailment of work opportunities and that they therefore had fewer jobs than could be normally distributed among the claimants and the other old employees applying for work, is clear from the record. For fuller discussion of this point, we respectfully refer the Court to the briefs filed on the application for the issuance of the Rule (M. Br. 3-8, 10-11, 27, 29; R. Br. 48-55).

(b) The petition further alleges (P. IV; App. 15-23) that the Board found that, despite the curtailment of employment opportunities as contended and represented by the Companies,

⁵ While additional men were put on after July 5, 1935, "the total pay roll fell a good deal short of the 1100 figure obtaining before the strike" (App. 27).

the Companies, since July 5, 1935, had discriminated against the 209 claimants as a class in that they were discriminatorily denied an equal opportunity with all other old employees who applied for work to share in such jobs as remained available and that accordingly, the Board ordered the Companies to offer immediate reinstatement to as many claimants as could be rehired and to place the remainder on a preferential hiring list (P. IV; App. 2-3, 25-26). These allegations are substantially admitted (A. III (4)).

(c) The petition then alleges (P. V) that the Board, in considering the remedial action necessary to reimburse the claimants for their wage losses, credited the Companies' representation that at all times after July 5, 1935, there were and would continue to be fewer positions available than normally would provide for the combined number of claimants and reapplicants, and was led to conclude therefrom that "a peculiar factual situation" existed and, hence, that the normal remedy should be withheld and a specially adapted remedy devised (P. V).

The Companies formally deny (i) that the Board credited any representation or contention as to the existence of an insufficiency of employment to provide for all claimants, (ii) that full back pay is or was the normal and usual remedy in cases of discrimination found, and (iii) that the Board had departed from its said normal and usual remedy (A. IH (53)). That the denials are insubstantial and raise no real issue of fact conclusively appears from the following:

(i) The Board's decision on its face (App. 24-33, 15-23) shows that it expressly credited the Companies' contention as to the insufficiency of available employment.

(ii) The Board, in its decision (App. 26), expressly alluded to its usual practice of requiring wrongfully discharged employees to be made whole by payment to them of an amount equal to what they would normally have earned with the employer from date of discrimination to date of reinstatement less net earnings elsewhere during that period. It expressly applied that remedy in the same case to employees Sheppard and Rayon, who were discharged outright (App. 29, n. 184) and therefore involved in the "peculiar factual situation" relating to the other claimants. The Board's consistent practice

in that regard, with which the Court is familiar from the many cases which have come before it on enforcement and review proceedings, had been specified previously in the Board's Annual Reports (Second Annual Report, pp. 148, 151-2, 153, 154; Third, pp. 200, 201 and note, 202, 210 and note, 211; Fourth, pp. 99, 102).⁶

(iii). That the special formula devised to meet the ostensible "peculiar factual situation" (App. 27), represents a plain departure from the usual remedy is apparent on its face (App. 29-33). The formula awards to each employee only a fraction of his actual loss. See M. Br. 4-10; R. Br. 47-49.

(d) The Board alleges that after the entry of the decree and reinstatement of the claimants pursuant thereto (P. VII), the Companies on May 1, 1942, tendered the sum of \$8,409.39, later reduced to \$5,400, in purported full payment of all back pay owing to the claimants under paragraphs 2 (d) and 3 (b) of the decree (P. VII), and that the Board thereupon, in accordance with its usual procedure, in order to verify the accuracy of the Companies' computations, made an examination, lasting several months, of the payrolls and records of the Companies; that the examination, completed in October 1942, disclosed the fact not theretofore made known, that despite any curtailment of employment, the Companies during the entire discrimination period were in a position to accord full employment at all times both to all reapplicants and claimants (P. VIII); so that it now appeared for the first time that absent discrimination, each claimant normally would have been accorded full employment and earned full wages during the discrimination period (P. IX). In support of the foregoing allegations, the Board attached to its petition as exhibits (App.

⁶ The following is stated in the Fourth Annual Report of the Board (p. 99):

"In addition to requiring the reinstatement of an employee discriminated against, the Board usually orders an employer to make such employee whole for loss of pay which he normally would have earned had the unfair labor practices not occurred." . . .

"Since the Board seeks to make whole employees who have been discriminated against by payment to them of a sum of money equal to that which the employees would normally have earned had the unfair labor practices not occurred, the amounts earned elsewhere during the period of discrimination are excluded from the sum to be paid."

"See Third Annual Report, p. 201."

34-46) compilations made from the Companies' own records as examined in 1942, showing that with the trifling exception of one week in the tri-state mines and several scattered weeks in the Galena smelter (App. 43-44), the number of positions available was in excess of the total number of claimants and reapplicants (Columns (2) to (7) of each Table).

The Companies admit the tender (A. III (8)). They purport to deny that "[their] records disclose that on or about July 5, 1935, petitioners were in a position to accord full employment to all claimants and to all reapplicants available for work" (A. III (8)), or that, absent discrimination, the claimants would have been accorded full employment and earned full wages during the discrimination period (A. III (9)). However, it is evident that this denial is purely formal; it is completely vitiated by the Companies' admissions and also by their failure to controvert the Board's specific and concrete showing. For example, the Companies do not controvert or deny the accuracy of the Board's supporting compilations made from Company records (App. 34-46), and demonstrating that during the 6 years of discrimination the Companies were in a position to accord full employment to all claimants and reapplicants. They do not deny the specific allegation in the Board's petition (P. VIII) that during the discrimination period they had been continuously employing a total number of new employees equal to and at times in excess of the total number of claimants and reapplicants and had paid wages to the new employees in a sum equal to and at times in excess of the aggregate amount which they normally would have paid to the claimants and available reapplicants. Furthermore, in the brief which they have incorporated in their answer (A. III (13)), they confirmed the admission, which they made in open court on February 27, 1943, in response to an inquiry from Judge Woodrough, that during the discrimination period they were in a position to accord full employment to all claimants and reapplicants (Co. Br. 4-5, 26, 27, 33, 34, 40, 49, 59), and even declared (contrary to what the record shows) that they *fully conceded* this circumstance upon the original Board hearing (Co. Br. 5-6, 39, 40, 50). The indisputable character of the evidence showing availability of employment during the discrimination period is further indi-

cated in the briefs (M. Br. 8, n. 9, 9; R. Br. 46). The Companies thus confirm the Board's allegation that during the 6-year period of discrimination, they were in a position to accord full employment to the claimants, and that but for the discrimination, the claimants would normally have been accorded and would have earned full wages during the discrimination period.

The Companies further deny that the information acquired by the Board from the examination of the Companies' pay rolls and records was new or different from that which the Companies supplied at the hearing (A. III (8)). However, the difference in character between the true employment situation as revealed by the unchallenged compilations and that as represented by the Companies in the original proceeding is apparent without explanation. In this connection, the discussion in the Board's reply brief is in point (R. Br. 53-55). There it is made clear that the record references relied upon by the Companies in their brief (Co. Br. 34-36) show that the only pertinent pay rolls which the Companies had ever exhibited to the Board previous to the Board's investigation of compliance with the Decree were those for two pay roll periods, both in the month of July 1935, and that these were exhibited and examined, not in relation to the employment situation continuously existing subsequent to July 5, 1935, but only in connection with determining whether the complaining Union had had a majority at the time of an alleged refusal to bargain occurring in July 1935, at the onset of the 6-year period of discrimination.

(e) The Board further alleges that the present remedy as applied to the actual situation now discovered requires the Companies to award to each claimant only a fractional portion of his loss (P. IX); that the total net back pay which would have accrued to the claimants under the normal remedy of full back pay amounts to approximately \$800,000 (P. X), and that apportionment among the claimants of \$5,400 claimed by the Companies to be the total amount due under the present formula, would be less than $\frac{3}{4}$ of one per cent (.0075) of the total wage losses of the employees (P. X); further, that the present remedy, however interpreted, if ultimately put into effect, would shift the loss resulting from the Companies' wrongdoing to the employees discriminated against and relieve the

Companies of the major part of their obligation, measured by the actual facts (P. XI).

The Companies do not deny the Board's allegation that the present remedy awards to each claimant only a fractional portion of his losses, but deny that the net losses of the claimants approximate \$800,000 (A. III (10)). However, such denial raises no material issue at this time, for as the Board consistently made clear (P. X, n. 9; M. Br. R. Br.), the precise amount of the Companies' proper liability is not now involved. It is sufficient for the purpose of the petition and this motion that the formula embodied in the prescribed remedy provides for substantially less than full restitution of the losses which the Companies imposed. It is thus clear, notwithstanding the Companies' denial (P. III (11)), that the remedy under paragraphs 2 (d) and 3 (b) of the decree as now in force, would substantially shift the loss resulting from Companies' unfair labor practices to the employees discriminated against (See M. Br. 10, n. 12; R. Br. 56, n. 4).

(f) By way of affirmative defense, the Companies aver that they have complied with the decree in its entirety, that as a result, no restoration of the status quo is possible, and that with the lapse of time the rights of the Companies have been irretrievably lost (A. III (13)); further, that the Board is estopped from any attempt to vacate the decree in part, because it accepted the benefits of the decree, and is barred by laches and want of due diligence (A. III (14)). These points were raised by the Company in its brief (Co. Br. 2, 51) and, we submit, fully answered in the Board's briefs (M. Br. 26-36; R. Br. 55-60). The Companies have not complied with the decree. They have paid out nothing to the claimants; they do not deny that they made a tender of \$8,409.39, which they later reduced to \$5,400 (P. VIII). The tender was never accepted and was expressly declared to be inadequate even under the remedy prescribed (P. X, n. 9, M. Br. 10-12; R. Br. 55-57). Since the remedy of back pay is in the public interest, the Board does not and cannot receive any benefits therefrom (R. Br. 59). As shown in the Board's briefs (M. Br. 26-34; R. Br. 55-57, 59-60), the Board acted with due diligence, and no facts appear which warrant estoppel or claim of laches or

negligence. Nor can estoppel, negligence, or laches lawfully be pleaded against the Board, an agency of the government (M. Br. 34-35).

(g) We further refer the Court to our briefs in support of our contention that the remedy now in force, applied to the actual conditions as newly discovered, frustrates the statutory purpose, impairs the due remedial operation of the administrative-judicial process, and injures important public rights; and that consequently, appropriate relief by this Court, as prayed for in the petition, is warranted (P. II, XI), and the Court has full power to grant and, in the proper exercise of its discretion, should grant the relief requested (M. Br. 14-39; R. Br. 57-59).

WHEREFORE, since the Companies have failed to raise a genuine issue in respect to any material allegation of the petition and have no valid defense thereto, the Board respectfully moves that the Court grant judgment, as prayed for in the petition, vacating paragraphs 2 (d) and 3 (b) of the Decree herein and remanding to the Board so much of this cause as is affected by said paragraphs 2 (d) and 3 (b) of the Decree for further proceedings consistent with the facts appearing.

ROBERT B. WATTS,

*General Counsel,
National Labor Relations Board,
Washington, D. C.*

NOVEMBER 1943.

(Extracts from the Brief on behalf of the Companies filed in the Remand proceedings.)

Page:

[45] The successor Board has misconceived the nature of the issues litigated and the defenses made in the original proceeding. Thus the availability of work for the claimants, or for the claimants and reapplicants, was never challenged by petitioners.

• • •

[26] The next pertinent allegation of the Board (p. 7) involves the examination of a self-evident non sequitur:

"Since the Companies had shown conclusively that employment opportunities had been permanently and substantially curtailed subsequent to July 5, 1935, the Board necessarily credited their representation and contention that, at all times thereafter, there were and would continue to be less positions available than normally would provide for the combined number of claimants and reapplicants."

The initial showing of a curtailment of employment manifestly did not amount to a representation, stated as a conclusion, that there was insufficient work for successful claimants and reapplicants. The fact that the employment level following the strike was lower than the pre-strike employment level in no sense implied that there was insufficient work for the reduced category (not of all pre-strike employees) of successful claimants and reapplicants.

• • •

[33] It is ridiculous to suggest that petitioners were contending both that they had invited all claimants to return to their employment and, also, that

they had precluded such return upon the theory of unavailability of work.

...

[34] It thus appears that there was no question in the mind of anyone as to the availability of work on or after July 5, 1935.

...

[49] We have heretofore demonstrated that the evidence revealed, the Board found, and this court found, that on or after July 5, 1935, there were sufficient jobs normally to provide for all claimants. The Board was not misled. The evidence was true.

(Order of Submission of Motion of National Labor Relations Board for judgment on pleadings, etc.)

United States Circuit Court of Appeals, Eighth Circuit.

March Term, 1944.

Monday, March 13, 1944.

Eagle Pieher Mining & Smelting Company, et al., Petitioners,

No. 460 vs. Original.

National Labor Relations Board.

This matter comes on this day to be heard on motion of National Labor Relations Board for judgment on pleadings and on joint and several pleas of petitioners to jurisdiction and motion to dismiss proceedings. After hearing Mr. A. Norman Someys, attorney for National Labor Relations Board, Mr. John G. Madden for petitioners, and Mr. Louis N. Wolf for intervener International Mining, Mill and Smelter Workers, Local Nos. 15, et al., this matter is by the Court taken under further submission on said motion for judgment and joint and several pleas and briefs of counsel.

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

Eagle-Picher Mining and Smelting Company, a Corporation,
and Eagle-Picher Lead Company, a Corporation,
Petitioners;

No. 460 vs. Original

National Labor Relations Board, Respondent.

International Union of Mine, Mill and Smelter Workers,
Local Nos. 15, et al., Intervener.

On Motion of National Labor Relations Board for Judgment on its Petition to Vacate Portions of Decree and for Remand.

[April 19, 1944.]

Mr. John G. Madden (Mr. A. C. Wallace, Mr. H. W. Blair, Mr. James E. Burke, and Messrs. Madden, Freeman, Madden and Burke, were with him on the brief) for Petitioners.

Mr. A. Norman Somers, Attorney, National Labor Relations Board (Mr. Robert B. Watts, General Counsel; Mr. Ernest A. Gross, Associate General Counsel; Mr. Howard Lichtenstein, Assistant General Counsel, and Mr. William J. Avrutis, Attorney, National Labor Relations Board, were with him on the brief) for Respondent.

Mr. Louis N. Wolf (Mr. Sylvan Bruner was with him on the brief) for Intervener.

Before Sanborn, Woodrough and Johnsen, Circuit Judges

Woodrough, Circuit Judge, delivered the opinion of the Court.

The National Labor Relations Board filed a petition in the nature of a bill of review to set aside, for fraud, mistake, and newly discovered evidence, paragraphs 2(d) and 3(b) of the final decree of this Court in this case dated

and entered June 27, 1941, and to remand the subject matter of those paragraphs to the Board for further proceedings. The Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company have filed their answer to the Board's petition. The answer challenges this Court's jurisdiction and the sufficiency of the petition. The Board has now moved for judgment on the record and the pleadings, upon the grounds that no genuine issue of fact exists with respect to any material allegation of the petition and that the Board, as a matter of law, is entitled to the relief prayed for. The companies assert that the motion of the Board is without merit and should be denied and that the petition of the Board should be dismissed.

Paragraphs 2(d) and 3(b) of the decree entered June 27, 1941, provide a formula for computing back pay which the companies are required to disburse among a group of 209 employees found to have been discriminatorily denied employment by the companies. It is claimed for the Board that the Board adopted and prescribed the formula because it was misled as to the number of men employed (and the corresponding number of jobs created) by the companies in their operations in the period after July 5, 1935, and as to the make up of the staff in respect to the former employment of the men, and believing the number to be smaller than it actually was and that the composition included more old employees than it actually did, the Board made inadequate award, contrary to its intention. After the decree, and in the course of steps to carry it out, the true number of employees and their true status as old or new employees had been ascertained by the Board's investigators from the companies' records, and it is claimed that the number of jobs included in the operations and the composition of the staff were such that the Board, if it had not been misled, and if it had known the truth, would not have adopted the formula of its order which was carried into our decree. The Board stated in its decision, "We have ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay", and it is claimed that on a right understanding of the true facts as to the number of men employed in the period and the composition of the staff, the Board would

have made such ordinary order, and that it should now be accorded opportunity to make that ordinary order in furtherance of the purposes of the Act.

The decree entered by this Court on June 27, 1941, was for the enforcement (with modifications not here material) of an order made by the Board on October 27, 1939. The position of the Board in these proceedings is that although the Board did not specifically find in its decision of October 27, 1939, just how many men the companies did employ or of what class in the period after July 5, 1935, or how many jobs existed, that the expressions the Board used in its decision show that the Board believed and understood there were not jobs enough to permit the companies to offer reinstatement in ordinary course to all those found by the Board to have been discriminated against and for whom it ordered reinstatement with back pay according to the formula. Its proof outside of the record previously before us consists of compilations made from the books of the companies by accountants which show, among other things, that the number of employees working for the companies was soon restored to nearly what it had been prior to July 5, 1935, and so continued, and the compilations disclose some incidents of the staff's composition not discussed in the Board's decision.

Our examination of the record and the showing herein has not persuaded that the Board departed from the form of order by which it "ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay" in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as the composition of the staff of workmen. The Board's formula makes provision for the computations concerning back pay for the group of 209 men in the case that the number of persons newly employed or reinstated after July 5, 1935, is less than, as well as in the case that it exceeds the number who are to be compensated under the order, and so it covers the events of a larger or smaller roll of workmen. The formula also takes into account the

matter of old employees continuing their employment and of the old employees reinstated and of newly employed persons.

The Board stated in its decision that "The peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo", and on review in this Court such difficulties were also apparent to us. They arose from many circumstances other than the uncertainty about the number of men required in the operations after July 5, 1935. The Judges were not in agreement on the fundamental question whether the Board could make any compensatory award to the group of 309 employees at all under the circumstances established, and sustained such power in the Board only by majority. The award to a group rather than to individual persons appeared to be a wide departure from the Board's "ordinary" procedure. We could not find prejudice to the companies in the formula adopted by the Board (and the companies alone were complaining of it), and although it is apparent on the face of it that it does not accord to each individual workman in the group an amount of back pay equal to a full wage from July 5, 1935, to the date of offer of reinstatement, and that it specifically provides a fraction only of such full wage, we held that the Board was within its rights in requiring payment of the fraction of such wage prescribed in the formula. It is stated for the Board that a full wage for the group for the period would amount to over One Million Three Hundred Thousand Dollars (less pay earned outside), and that the companies have put a construction upon the formula and made computations thereunder resulting in less than Six Thousand Dollars total to be paid the group. But it is not contented that the decree is unintelligible. No agreement has been reached concerning the computations and the decree remains to be carried out.

We are not convinced upon the showing in these proceedings that the parts of the order and decree attacked were obtained by misrepresentation or wrongful conduct of the companies, or that on account of any mistake of the Board perversion of justice or unfair administration of the Act

has been established justifying revocation or remand to the Board of the parts of the decree involved.

Our conclusion is that, while this Court has jurisdiction over the enforcement of all of the provisions of its decree which remains unexecuted, the petition of the Board and the record in this case present an insufficient factual basis for setting aside paragraphs 2(d) and 3(b) of the decree and for remanding the subject matter thereof to the Board. The motion of the Board for judgment upon its petition is therefore denied, and the petition is dismissed.

(Order denying Motion of Labor Board for judgment upon its petition and dismissing petition in the nature of a bill of review.)

United States Circuit Court of Appeals, Eighth Circuit.

March Term, 1944.

Wednesday, April 19, 1944.

Eagle-Picher Mining and Smelting Company, a corporation, and Eagle-Picher Lead Company, a corporation, Petitioners,

No. 460 vs. Original.

National Labor Relations Board, Respondent.

International Union of Mine, Mill and Smelter Workers, Nos. 15, 17, 107, 108 and 111, Intervener.

On motion of National Labor Relations Board for Judgment on its Petition to Vacate Portions of Decree and for Remand.

In this cause the National Labor Relations Board filed a petition in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2(d) and 3(b) of the final decree of this Court in this case dated and entered June 27, 1941, and to remand the subject matter of those paragraphs to the Board for fur-

ther proceedings. The Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company filed their answer to the said petition. The said Board thereafter filed a motion for judgment on the record and the pleadings.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the motion of the said Labor Board for judgment upon its petition, be, and is hereby, denied, and the said petition in the nature of a bill of review, be, and is hereby, dismissed.

April 19, 1944.

No. 460

**In the United States Circuit Court of Appeals
for the Eighth Circuit**

**EAGLE-PICHER MINING AND SMELTING COMPANY, A COR-
PORATION, AND EAGLE-PICHER LEAD COMPANY, A COR-
PORATION, PETITIONERS**

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**PETITION OF NATIONAL LABOR RELATIONS BOARD FOR JUDG-
MENT OF ITS PETITION TO VACATE PORTIONS OF DECREE AND
REMAND**

**PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR
REHEARING**

ALVIN J. ROCKWELL,
General Counsel

MALCOLM F. HALLIDAY,
Associate General Counsel

**A. NORMAN SOMERS,
WILLIAM J. AVRUTIS,**
*Attorneys
National Labor Relations Board*

**In the United States Circuit Court of Appeals
for the Eighth Circuit**

No. 460—Original

**EAGLE-PICHER MINING AND SMELTING COMPANY, A COR-
PORATION, AND EAGLE-PICHER LEAD COMPANY, A COR-
PORATION, PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON MOTION OF NATIONAL LABOR RELATIONS BOARD FOR JUDG-
MENT OF ITS PETITION TO VACATE PORTIONS OF DECREE AND
REMAND**

**PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR
REHEARING**

*To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Eighth Circuit:*

The National Labor Relations Board respectfully petitions this Court for a rehearing in the above-entitled cause and in support of this petition respectfully shows as follows:

On April 19, 1944, this Court rendered its decision denying the Board's motion for judgment on its petition to vacate portions of the decree dated and entered June 27, 1941, herein, and for remand of so much of this cause as is affected by paragraphs 2 (d) and 3 (b) of said decree.

(1)

The Court denied the Board's application upon the ground that it was not convinced that the Board in departing from its usual remedy of full back pay had done so because of its understanding as to the employment situation existing in the Companies' operations after July 5, 1935. The Court based its decision upon two stated premises:

(1) That—

The Board's formula makes provision for the computations concerning back pay for the group of 209 men¹ in the case that the number of persons newly employed or reinstated after July 5, 1935, is less than, as well as in the case that it exceeds the number who are to be compensated under the order, and so it covers the events of a larger or smaller roll of workmen.

(2) That—

The Board stated in its decision that "The peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo", and on review in this Court such difficulties were also apparent to us. They arose from many circumstances other than the uncertainty about the number of men required in the operations after July 5, 1935.

We submit that the Court in denying the Board's motion in reliance upon these premises inadvertently overlooked material matters of fact as follows:

¹ We herein refer to the 209 employees whom the Board found to have been discriminatorily refused reinstatement as "the claimants." We use the term, "reapplicants," to refer to all other employees on the companies' pay rolls of May 8, 1935, who applied for work with the respondents, whether successfully or not, after July 5, 1935.

1. We gather from the Court's first premise that the Court is of the impression that the Board, by the formula, undertook to provide a remedy operating in situations where there was full employment available for each claimant as well as where there was insufficient distributable employment. This the Board did not do.

The Board's formula is based upon its finding that there were "at all times less jobs open than old employees available" (R. 14113; 16 N. L. R. B. at p. 834; App. 27) and that, absent discrimination, jobs would have been distributed among all claimants and re-applicants on a proportional basis. (R. 14116, footnote 186; 16 N. L. R. B. at p. 836, footnote 186; App. 30-31). The formula provides for a lump sum of which a *fraction* is to be apportioned among the claimants at all times. This governing fraction is the ratio which (a) the number of claimants bears to (b) the total number of all claimants *plus* the total number of all other old employees re-applying after July 5, 1935. Distribution of the back pay award in such manner is the device which the Board avowedly used in order to allocate to the claimants the earnings from their proper proportion of the jobs which normally would have been pro-rated among all claimants and re-applicants due to the employment insufficiency which it had found to prevail. The Board said:

* * * we shall not credit the entire lump sum to the claimants discriminated against, *since we cannot assume* that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do

assume for this purpose that a *proportionate amount of such claimants would have been given the jobs* (R. 14114-14115; 16 N. L. R. B. at pp. 835-836; App. 39). [Italics added.]

The fact that the formula was advisedly constructed so as to make *pro rata* distribution of the proceeds from jobs which had been denied the claimants, demonstrates that the Board at no time undertook to provide for conditions of full employment. The formula sought to prorate among the claimants the proceeds from jobs which in aggregate were insufficient to provide for *all* old employees, regardless of whether there happened to be available jobs greater in number than the number of claimants alone.

The prorating plan which the Board prescribed operated as follows: If there were 200 claimants and 100 reapplicants, and 200 jobs were available after July 5, 1935, the formula, which would accord to the claimants their proportionate share of the lump sum represented by the ratio of all claimants to the total number of all claimants and reapplicants, would distribute among the claimants, pursuant to the Board's intention, only two-thirds of the lump sum, or the earnings of 133 employees. In the event that the number of jobs available exceeded 209, the number of claimants, *but was less than sufficient to provide for all claimants and reapplicants*, the situation under the formula still would be the same, for, the claimants even then could have participated *only* in their proportionate share of such jobs as were available. The Board had found that while there had been approximately 1,100 jobs prior to the strike, on July 5, 1935,

there were 595 old *and new* employees on the Companies' pay rolls, and that this number included 154 new men (R. 14075, 14079; 16 N. L. R. B. at pp. 796, 800). Hence, only 441 old employees were working at that time. This meant that there were some 659 (that is to say 1,100 minus 441) old employees not then on the pay rolls. Normally, men seek to return to their jobs, and the Board found "that in so far as possible and insofar as they were available, those persons who had been on the pay rolls on May 8, 1935, were rehired" (R. 14079; 16 N. L. R. B. at p. 800). To have provided work for all old employees not working on July 5, 1935, conceivably about 659 jobs (of which 209 would be filled by the claimants) might have been necessary. The only condition under which a job normally could have been available for each claimant was one where the number of new and reinstated employees equalled or exceeded the number of claimants and re-applicants. The Board found, however, that the Companies, after July 5, 1935, never employed as many employees as had worked for them prior to the strike, and since, as the Companies represented, and the Board found, they took back old employees predominantly (R. 14075, 14079, 16 N. L. R. B. at pp. 796, 800), that a condition of full employment never existed after July 5, 1935. Hence, the Board made no provision for a situation of full employment in its scheme of distribution of back pay calling for fractional allocation at all times.

However, the Court may have in mind footnote 185 of the Board's decision which provides,

If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. * * *
(R. 4115; 16 N. L. R. B. at p. 835; App. 29).

This footnote, which is a subordinate part of the Board's entire formula, can be read and understood only in the light of the specific factual situation which the Board had found, and which it set out to meet by the formula. All that the footnote does is to limit the amount of *earnings* to be placed in the lump sum, subject to later fractional distribution under the governing proportion, to a maximum of so much as a number of old and new employees equal to the number of claimants could have earned.

The footnote merely affected the lump sum to be distributed. But it was the governing proportion which determined what *part* of the lump sum should go to the claimants. And the governing proportion was based upon the premise of insufficient available employment *at all times*. Consequently, the Board nowhere provided for a situation where full employment was available, but at all times for a situation of partial employment.

2. The Court's decision indicates that other difficulties entered into the Board's framing of its back-pay remedy in addition to its understanding that reduced employment opportunities prevailed at all times after July 5, 1935.

The Board, however, designated as its only difficulty the fact that it was "apparent from the record that the total pay roll fell a good deal short of the 1,100 figure obtaining before the strike," and that there were "presumably at all times less jobs open than old employees available" (R. 4113; 16 N. L. R. B. at p. 834; App. 27). Hence it based its remedy solely upon the assumption that the earnings from such jobs as were open had to be deemed apportioned among the claimants and all other old employees applying. Thus, it is clear from the face of the decision that the Board's finding of insufficient distributable employment was the only factor motivating it in fashioning its formula.

The Court, in referring to "other difficulties" which it indicates caused the Court to divide when it came to pass upon the question of enforcement could have referred only to the situation arising from the fact that certain claimants had not reapplied for their jobs. The Court noted in its decision enforcing the Board's order (119 F. (2d) 903, 904, that

A majority of the Court agree with the Board's view that under the evidence it was not necessary for the striking employees to have made application to return to work in order to be entitled to reinstatement and an allowance of back pay.

Clearly, the question which had divided the Court had no bearing upon the lump-sum formula and was in no way a factor which the Board considered in formulating its back-pay remedy. The question upon which the Court had disagreed related purely to the issue of liability and not to the scope of the remedy. As

appears from the face of the Board's decision (R. 14078; 16 N. L. R. B. at p. 799), it was merely applying the very familiar principle which it had previously enunciated in several cases, including *Matter of Carlisle Lumber Company*, 2 N. L. R. B. 248, enforced, 94 F. (2d) 138 (C. C. A. 9) cert. denied 304 U. S. 575; that where an employer's conduct makes reapplication a futility, such reapplication is unnecessary for reinstatement and back pay.² In none of these cases where the Board had applied this principle did the fact that reapplication had not been made lead the Board to award less than full back pay. This was because the Board, in these cases, had not been confronted with the situation of insufficient employment opportunities for all old employees which existed in the case at bar.

The Court's decision in the proceedings for enforcement and review plainly shows that there was no division on the question of the propriety of the lump-sum formula. The Court was unanimous in holding that a remedy in the form of a lump-sum formula was not prejudicial, remarking on page 915 of its opinion that "we cannot see that petitioners are prejudiced in any way by the Board's method of apportionment." The Companies were not prejudiced because, applying the formula under the facts as found by the Board, they

² The Board had noted in its decision that it also had applied this principle in the following cases: *Matter of Jacob A. Hunkele*, 7 N. L. R. B. 1276, 1289, 1293; *Matter of the Grace Company*, 7 N. L. R. B. 766, 775, 780; *Matter of Sunshine Mining Co.*, 7 N. L. R. B. 1252, 1269, 1275, enforced in *Sunshine Mining Co. v. N. L. R. B.*, 110 F. (2d) 780 (C. C. A. 9), cert. denied, 312 U. S. 678.

were to be liable for no greater sum than had been lost in wages by the unidentified employees in the group of 209 claimants discriminated against who would have been employed but for such discrimination.

Accordingly, it is clear that the Board's formula did, in fact, come into being solely because of the Board's mistaken understanding as to the number of jobs available after July 5, 1935, based upon its assumption of the existence of an insufficiency of distributable employment. The formula provides only for a situation where there is an insufficiency of jobs. As here applied, under the conditions which the Companies now admit to have existed, no matter how many new jobs opened, and no matter how much employment was available, the formula distributes among the claimants the proceeds of no more jobs than would have been earned by only a fraction of the number of all the claimants, such fraction being derived from the ratio of the number of claimants to the total number of claimants and reapplicants. Such fractional restitution under a condition of full employment was never intended by the Board and frustrates the purpose stated on the face of its decision. It does not constitute restoration of the *status quo* and plainly departs from the recognized and approved purpose of the Board in its administration of the Act.

There can be no question, therefore, that application of the formula to the actual situation now discovered would result in perversion of justice and unfair administration of the statute. Such a situation warrants correction.

CONCLUSION

Wherefore the Board prays that a rehearing of this case be allowed, and that on such rehearing its motion for judgment on its petition to vacate paragraphs 2 (d) and 3 (b) of the decree, and for remand, be granted.

Respectfully submitted,

ALVIN J. ROCKWELL,
General Counsel,

MALCOLM F. HALLIDAY,
Associate General Counsel,

A. NORMAN SOMERS,

WILLIAM J. AVRUTIS,

Attorneys,

National Labor Relations Board.

CERTIFICATE OF COUNSEL

Comes now Alvin J. Rockwell, General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith and not for purposes of delay.

ALVIN J. ROCKWELL,
General Counsel,

National Labor Relations Board.

Dated at Washington, D. C., this — day of May
1944.

(Motion of Intervener for Leave to File Motion to Modify
Decree or to Remand.)

To the Honorable, the Judges of the United States Circuit
Court of Appeals for the Eighth Circuit:

The International Union of Mine, Mill and Smelter
Workers, Locals No. 15, 17, 107, 108 and 111, Intervener
in this cause, respectfully requests leave to file its Motion
To Modify Decree Or To Remand, copies of which have
heretofore been delivered to the clerk of this Court.

SYLVAN BRUNER,
LOUIS N. WOLF,
Attorneys for Intervener.

(Endorsed): No. 460, Orig. Filed in U. S. Circuit Court
of Appeals on May 11, 1944.

(Order Granting Leave to File Motion of Intervener to
Modify Decree or to Remand.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1944.

Wednesday, May 17, 1944.

Eagle-Picher Mining & Smelting Company, a Corporation,
and Eagle-Picher Lead Company, a Corporation,
Petitioners,

No. 460. vs. Original.

National Labor Relations Board, Respondent,
and)

International Union of Mine, Mill and Smelter Workers,
Locals No. 15, 17, 107, 108 and 111, Intervener.

Motion of Intervener for leave to file its motion to
modify decree of this Court or remand this matter to the
National Labor Relations Board, etc., has been considered
by the Court and leave is granted to file said motion to
modify or remand.

May 17, 1944.

In the
United States Circuit Court of Appeals
For the Eighth Circuit.

EAGLE-PICHER MINING AND SMELTING COMPANY, a Corpora-
tion, and EAGLE-PICHER LEAD COMPANY, a Corporation,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
and

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS No. 15, 17, 107, 108 and 111,
Intervener.

**INTERVENER'S MOTION TO MODIFY DECREE
OR TO REMAND.**

SYLVAN BRUNER,
of Pittsburg, Kansas,
LOUIS N. WOLF,
of Joplin, Missouri,
Attorneys for Intervener.

In the
United States Circuit Court of Appeals
For the Eighth Circuit.

EAGLE-PICHER MINING AND SMELTING COMPANY, a Corpora-
tion, and EAGLE-PICHER LEAD COMPANY, a Corporation,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
and

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS No. 15, 17, 107, 108 and 111,
Intervener.

No. 460—ORIGINAL.

**INTERVENER'S MOTION TO MODIFY DECREE
OR TO REMAND.**

To the Honorable, the Judges, of the United States Circuit
Court of Appeals for the Eighth Circuit:

The International Union of Mine, Mill and Smelter
Workers, Locals No. 15, 17, 107, 108 and 111, intervener in
this cause, for said locals and on behalf of the 209
claimants found by the National Labor Relations Board
(hereinafter referred to as the Board) to have been dis-

criminated against within the meaning of Section 8 (3) of the National Labor Relations Act by the Eagle-Picher Mining and Smelting Company and the Eagle-Picher Lead Company (hereinafter referred to as the Companies), respectfully petitions this Court to modify its decree or to remand this cause, so as to assure the claimants payment of back wages in accordance with their losses and as expressly intended by the Board, in a manner more fully set forth in the prayer for relief herein.

In support of this motion the intervener shows the Court as follows:

1. Upon charges filed by the intervener that unfair labor practices had been committed by the Companies, the Board issued its complaint against the Companies. Thereafter, on October 27, 1939, after a hearing duly held, the Board issued its remedial order against the Companies. On June 27, 1941, this Court duly entered its decree enforcing the Board's order, with modifications not here material.

2. The Board's order was based upon findings that the Company, among other unfair labor practices found to have been committed, had discriminated against the claimants with respect to hire and tenure of employment by refusing to rehire or retain in their employ striking employees after resumption of operations following a strike which occurred on May 8, 1935. The Board found that after such resumption of operations the Companies employed a smaller number of employees than had been on their payrolls at the time of the strike. It further found that the Companies, on and after July 5, 1935 (the effective date of the Act), discriminatorily denied the claimants an equal opportunity with all other old employees on the May 8, 1935, payrolls who applied for work on and after July 5, 1935 (hereinafter termed the reapplicants), to share in such jobs as were available. As a part of the

affirmative remedial action found necessary to effectuate the policies of the Act, the Board ordered the Companies to offer immediate reinstatement to as many claimants as could be rehired and to place the remainder on a preferential hiring list.

3. In considering the problem of reimbursing the claimants for wages lost in consequence of the Companies' discrimination, the Board said:

"In cases where we have found that certain employees were discriminatorily discharged or refused reinstatement, we have ordinarily ordered the offending employer to make them whole with back pay, this being an amount equal to what they would have earned with the employer from the date of discrimination to the date of reinstatement pursuant to our order, less net earnings elsewhere during the same period. The objective is, of course, to restore the situation as nearly as possible to that which would have obtained but for the illegal discrimination. *Our order in the present case is designed to achieve the same objective*, but the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo. . . . had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work, since there were presumably at *all* times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of the claimants discriminated against would have returned, but here again we cannot tell which ones."

(16 N. L. R. B. at p. 834.) (Emphasis ours.)

4. By the language set forth in paragraph 3, the Board affirmed its customary practice of awarding full back wages to each employee discriminated against under con-

ditions where full employment during the discrimination period had been available for all employees found to have been discriminated against.

5. By the language set forth in paragraph 3, the Board further affirmed that upon its findings that the Companies had discriminated against all the claimants, it normally would have prescribed its customary remedy of full back wages to each claimant in the instant case.

6. By the language set forth in paragraph 3, the Board further affirmed that it was finding it necessary to depart from its normal remedy of full back pay because it had found that during the entire discrimination period there were "at all times less jobs open than old employees available" and hence that normally (i. e., absent discrimination), not all of the claimants would have been rehired, for which reason it was impossible to ascertain which specific individuals among the entire group of 209 claimants discriminated against would have received employment on and after July 5, 1935.

7. Since the Board found that there were "at all times less jobs open than old employees available" and therefore impossible to ascertain which individuals among the group of 209 claimants would have been rehired absent discrimination, the Board concluded that an equitable method of remedying the situation supposedly existing would be to distribute among the claimants as a group the wages from so many jobs as normally would have been allocated to individuals among the claimants.

8. To accomplish its stated purpose, the Board devised a formula whereby the Board intended that pro rata distribution should be made of the proceeds from all jobs filled by reapplicants and new employees during the discrimination period. The Board found that although these jobs had been denied the claimants as a group, the claim-

ants normally would have shared in such jobs in proportion to their number with all other old employees re-applying after July 5, 1935. The formula provided that there be computed as a lump sum the total amount of wages paid to all new or reinstated employees from July 5, 1935, to the date of compliance with the reinstatement provisions of the Board's order, but, as limited by the provisions of footnote 185 hereinafter more particularly considered. Since the Board assumed that absent discrimination, available jobs would have been distributed only proportionately among the claimants and reapplicants, the Board directed that there be distributed among the claimants only such portion of said lump sum as should be determined by a governing fraction having as its numerator the number of claimants and as its denominator the aggregate number of claimants and reapplicants. The Board said:

"For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs." (16 N. L. R. B. at p. 835.)

The Board further made provision for a deduction of net interim earnings from the share of each claimant.

9. In the Board's plan of prescribing back pay under a continuing situation of partial distributable employment, the Board limited the amount of the lump sum, a fraction of which was to be subject to distribution to the claimants, by footnote 185 to the Board's decision and order. Said footnote 185 provides:

"If at any given time during this period the number of new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum."

10. Paragraphs 2(d) and 3(b) of the decree enforced "The Remedy" of the Board's order with respect to payment of back pay pursuant to the footnote and formula described above.

11. If ultimately put into effect, the back pay remedy now enforced by paragraphs 2(d) and 3(b) of the decree, by reason of the arbitrary effect of footnote 185, would operate with serious and gross inequity against the claimants, in that, contrary to the Board's purpose and intention as expressed in the text of "The Remedy," in every situation where there are more new or reinstated employees than there are claimants, there would be distributable among the claimants less than the earnings which they would have made on the basis of a proportional distribution of available jobs among them and the other old employees applying for work. This is demonstrated by the following examples:

a. Assuming, in round figures¹, that the number of

¹The Companies' audit (see, paragraph 20, post) discloses that the number of reapplicants at both Companies totaled 220, or 189 at the Mining Company and 31 at the Lead Company. Such audit computes the governing proportion for the Mining Company at 46.91%, and for the Lead Company, 57.53%. The number of claimants discriminated against by each Company is 167 and 42, respectively.

claimants to be 200; the number of reapplicants to be 200 also, and the number of new or reinstated employees to be less than the number of claimants, for instance, 150, the *governing proportion* under the formula then would be:

$$\frac{200 \text{ (claimants)}}{200 \text{ (claimants)} + 200 \text{ (reapplicants)}, \text{ or } \frac{200}{400}, \text{ or } \frac{1}{2}}$$

and this fraction multiplied by 150 (the number of new and reinstated employees assumed) equals 75. In such example, the 200 claimants would as a group share in the earnings from 75 jobs. This is fair, and accords with the Board's purpose and intention.

b. Assuming 200 claimants and 200 reapplicants as in the previous example, but a number of new or reinstated employees *exceeding* the number of claimants, for instance, 350, the application of the governing proportion prescribed by the formula (exclusive of footnote 185) would produce

$$\frac{200}{400}$$

the following equation: $\frac{200}{400}$ (the same ratio as before) times 350 jobs, or 175. In this example, it would have been consistent with the provisions of the formula contained in the *text* of "The Remedy," as well as the Board's expressed intention, for the 200 claimants as a group to share in the earnings of 175 jobs. This also is fair, and accords with the Board's purpose and intention.

c. However, footnote 185 limiting the earnings from the number of jobs to be credited to the lump sum to *no more than the number of claimants*, here assumed to be 200, becomes operative under a situation such as described in example (b) *supra*, i. e., where the number of ~~new~~ and reinstated employees amounts to 350 and hence exceeds the number of claimants. Applying footnote 185 to example (b), the resultant equation is as follows:

$$\frac{200}{400}$$

(the same ratio as before) multiplied by the proceeds

from 200 jobs (and not 350 jobs), or the proceeds from 100 jobs. Applying such footnote it thus appears that the 200 claimants would share in the proceeds of only 100 jobs, whereas, properly, and in order to effectuate the purposes of the Act and the expressed intention of the Board, such claimants should share in the proceeds from 175 jobs, where there are 350 new and reinstated employees, as demonstrated in the preceding paragraph.

12. In all cases where the number of new and reinstated employees exceeds the number of claimants, footnote 185, when applied in conjunction with the governing proportion or fraction prescribed by the formula, therefore, compels an unfair and inequitable result and one repugnant to the expressed purpose of the Board as stated in that portion of its decision which sets forth its remedy.

13. The Board committed inadvertent arithmetical error and a mistake in devising footnote 185 of the formula, and the Court committed inadvertent error and mistake in requiring enforcement of such footnote.

14. The purpose of footnote 185 is unintelligible in view of the Board's manifest intendment as it appears in the text of "The Remedy," to-wit, "to make distributable among the claimants an amount equal to the proceeds of as many jobs as would have gone to the claimants on the basis of a proportional distribution of available jobs among them and all other employees applying.

15. Where the number of new or reinstated employees exceeds the number of claimants *plus* reapplicants (in which event there would then be full available employment for all claimants), "The Remedy" section of the Board's decision implicitly states that the Board would then utilize its usual and customary method of computing back pay for the discriminated claimants. Therefore, in addition to the repugnancy of footnote 185 to the formula

and to other provisions of "The Remedy," the footnote is unnecessary and superfluous.

16. In order to effectuate the purposes of the Act and fulfill the Board's expressed intention, footnote 185 should be stricken from the Board's decision as enforced by the Court's decree.

17. The Intervener's contention herein above set forth that the Board made a mistake requiring modification of the back pay provisions of the decree or a remand to the Board, is independently made, and intended to supplement and not contravene the Intervener's position that the Board's prior motion requesting a remand on the basis of newly discovered facts, was proper and should be granted by the Court. Intervener joins with the Board in urging that the Court grant the Board's petition to vacate paragraphs 2(d) and 3(b) of the decree for further proceedings consistent with the facts now for the first time appearing, and joins with the Board in requesting that its petition for rehearing be allowed.

18. Said formula was not intended to and by its terms could not remedy a situation where, during the discrimination period, full distributable employment might have been available to all the claimants. It had no applicability to such a situation because it made no provision that the claimants be made whole by the payment of full net back wages to each claimant during periods when there might have been full employment for all claimants.

19. The Board did not intend by the formula that less than full net back wages should be awarded to the claimants in the event that there be such employment conditions as should warrant its customary remedy of full back pay. The Board had found that the number of old employees **available** after July 5, 1935, exceeded the number of jobs available *at all times*, and, therefore, had con-

cluded that it was unnecessary to provide for such a situation of full available employment for all claimants.

20. On August 23, 1941, the Companies offered reinstatement to the claimants (except James Curry), thereby terminating the back pay period as of that date.

21. Upon information and belief, the Companies on or about May 1, 1942, furnished the Board with an audit containing computations as to the amounts of back pay which the Companies claimed to be due and payable under paragraphs 2(d) and 3(b). At the same time the Companies tendered the sum of \$8,409.39 as the total they claimed to be due as back pay, and further claimed that such sum was distributable among no more than 24 claimants under the terms of the decree. The Board refused this tender, and subsequently, the Companies averred that no more than \$5,400.00 was due and owing to the said claimants, or a lesser number by virtue of the formula prescribed by the Board and enforced by the decree.

22. The Board thereupon investigated the Companies' payrolls and records in order to determine whether said audit and computations were accurate. Such investigation, lasting for several months, was concluded in the winter of 1942, and disclosed that without taking into account any new employment created by the subsequent acquisition of properties from other owners (including specifically, but not limited to, the Commerce Mining & Royalty Company and the Mary M. Mining Company), and despite any curtailment of employment, the Companies during the entire discrimination period, were in a position to provide jobs for all claimants and all reapplicants.

With these exceptions: that Eagle-Picher Mining & Smelting Company at its tri-state mines during the week ending September 10, 1936, and at its smelter located at Galena, Kansas, during 33 isolated weeks in the six year discrimination period, was in a position to employ on the average at least 95% (instead of 100%) of the total number of claimants and all other old employees reapplying.

23. Upon information and belief, the Board thereupon computed the back pay due under the conditions found to exist as set forth in the preceding paragraph. The Board has stated of record to this Court that such computations disclosed that for the entire 6-year discrimination period such gross sum is payable to the claimants as would allot to each claimant an average of approximately \$3,800.00 in back pay, after deduction of net interim earnings.

24. In a proceeding heretofore brought by the Board (after discovering the inapplicability of its prescribed remedy) for the purpose of vacating paragraphs 2 (d) and 3 (b) of the decree and remand to the Board of so much of said cause as is affected thereby, the Companies admitted that during the discrimination period they were in a position to rehire all claimants and reapplicants. Such admission was made in open court and also on pages 45, 26, 27, 33, 34, 40, 49 and 59 of the Companies' brief submitted to this Court in opposition to the Board's petition for rule to show cause and to vacate and remand.

25. The Board's understanding as to the employment situation prevailing in the Companies' operations, arrived at during the time of drafting its decision and order, was contrary to what was subsequently revealed to be the actual employment situation during the entire discrimination period. By reason of mistake of fact, the Board had fashioned a remedy based upon the situation which it had found to obtain, predicated on evidence adduced at the hearing held pursuant to its complaint, and had made no provision for remedying the situation which actually existed and which it subsequently discovered. The provisions of the Board's order, however, were enforced by the Court in reliance upon the findings of the Board mistakenly made.

26. To date, the Companies have made no payments to any of the claimants on account of back pay payable un-

der paragraphs 2 (d) or 3 (b) of the decree, and the decree remains unexecuted with respect to said paragraphs.

27. The provisions of paragraphs 2 (d) and 3 (b) of the decree and so much of the Board's order as is enforced thereby should be modified so as to accord with the facts now found to exist during the entire discrimination period from July 5, 1935, to August 23, 1941.

28. The hearing before the Board's trial examiner upon the Board's complaint against the Companies was concluded on April 28, 1938. With respect to so much of the back pay provisions of the order and decree as are applicable to the period subsequent to the close of the hearing, the Board's order and the Court's decree are executory and continuing, and subject to modification upon disclosure of an employment situation of full distributable employment for all claimants, and a situation for which the Board had not theretofore made provision. Independently of the consideration set forth in the preceding paragraph, the situation is the same as would prevail if, subsequent to the close of the hearing, there had been a change of circumstances warranting modification of the back pay provisions of the Board's order and the Court's decree in so far as said provisions apply to that part of the discrimination period which was subsequent to the close of the hearing. Because of the foregoing, paragraphs 2 (d) and 3 (b) of the decree should be modified so as to allow the claimants *full* back pay in any event for the discrimination period which was subsequent to the close of the hearing, to-wit, from April 28, 1938, to August 23, 1941.

29. By reason of the premises, the Board's order as enforced by the Court's decree is such as would bring about a perversion of justice and an unfair administration of the Act justifying revocation or remand to the Board of the parts of the decree involved.

Wherefore, the Intervener and each of said claimants, being aggrieved by the Board's order and decision as enforced by the Court's decree, respectfully request this Honorable Court:

1. To strike out all of footnote 185 contained in the section of the Board's decision entitled "The Remedy," as enforced by the Court's decree.

2. To modify both paragraphs 2 (d) and 3 (b) of the Court's decree by adding the following:

"During periods of full available employment for all the persons listed in said appendix, the formula prescribed in the section entitled "The Remedy" shall not be operative. During such periods the respondent shall make such persons whole for any losses of pay they may have suffered, by payment to each of them of a sum equal to that which each would have earned with said respondent from the date of discrimination to the date of reinstatement pursuant to our order, less net earnings elsewhere during the same periods, with limitations in periods as set forth in parentheses after the names listed in said appendix."

or, in any event, by adding to each of said paragraphs 2 (d) and 3 (b) of the Court's decree the following:

"During periods of full available employment for all the persons listed in said appendix existing after the close of the hearing before the Board's trial examiner on April 28, 1938, the formula prescribed in the section entitled "The Remedy" shall not be operative. During such periods the respondent shall make such persons whole for any losses of pay they may have suffered, by the payment to each of them a sum equal to that which each would have earned with said respondent from April 28, 1938, to the date of reinstatement pursuant to our order, less net earnings elsewhere during the same periods, with limita-

tions in periods as set forth in parentheses after the names listed in said appendix."

3. Or, in the alternative, to vacate paragraphs 2 (d) and 3 (b) of the decree and remand to the Board so much of this cause as is affected by said paragraphs 2 (d) and 3 (b) of the decree for further proceedings consistent with the facts now for the first time appearing.

4. To grant such other and further relief as may be just and proper and as the nature of this proceeding may require.

SYLVAN BRUNER,

LOUIS N. WOLF,

Attorneys for Intervener and Claimant

Dated at Joplin, Missouri, this 8th day of May, 1944.

State of Missouri, County of Jasper—ss.

I, Louis N. Wolf, being first duly sworn, on oath depose and say that I am one of the attorneys for the within named intervener and all the claimants; that I have read the foregoing motion and know the contents thereof, and that the statements made therein as upon personal knowledge are true and those upon information and belief I believe to be true.

LOUIS N. WOLF.

Subscribed and sworn to before me this 8th day of May, 1944.

(Seal)

ETHEL WRIGHT,

Notary Public.

My commission expires October 26, 1945.

(Order Denying Petition of Respondent for Rehearing.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1944.

Wednesday, May 17, 1944.

Eagle-Picher Mining & Smelting Company, a Corporation,
and Eagle-Picher Lead Company, a Corporation,
Petitioners,

No. 460. vs. Original.

National Labor Relations Board, Respondent.

The petition for rehearing filed by counsel for the National Labor Relations Board having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.

May 17, 1944.

(Order Denying Motion of Intervener to Modify Decree or to Remand, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1944.

Wednesday, May 17, 1944.

Eagle-Picher Mining & Smelting Company, a Corporation,
and Eagle-Picher Lead Company, a Corporation,
Petitioners,

No. 460. vs. Original

National Labor Relations Board, Respondent,
and

International Union of Mine, Mill and Smelter Workers,
Locals No. 15, 17, 107, 108 and 111, Intervener.

Motion of Intervener to modify decree, or, in the alternative, to vacate paragraphs 2 (d) and 3 (b) of the decree of this Court and remand to the Board so much of this cause as is affected by said paragraphs of the decree for further proceedings consistent with the facts now for the first time appearing, etc., has been considered by the Court and is now hereby denied.

May 17, 1944.

(Motion of Intervener for Order to Transmit Certain Original Exhibits to Supreme Court, U. S.)

Comes now the above named Intervener and states that said party will make application to the Supreme Court of the United States for a writ of certiorari to review the orders and decisions of this Court dated April 19, 1944, and May 17, 1944; that your Intervener has requested the Clerk of this Court to transmit to the Supreme Court of the United States, as a part of the certified transcript of record to be filed therein, Board's Exhibits Nos. 237, 238, 239, 260, 261 and 262; that your Intervener believes said Exhibits and original records will be helpful or necessary to a determination of said review proceedings; that it is not conceivable that said Exhibits will be of any further use to this Court; that your Intervener will undertake to see that said Exhibits are returned to this Court, should this motion be granted, after they have served their purpose in the Supreme Court.

Wherefore, your Intervener prays for an Order permitting the Clerk of this Court to transmit to the Supreme Court of the United States the original Board's Exhibits Nos. 237, 238, 239, 260, 261 and 262.

LOUIS N. WOLF,
SYLVAN BRUNER,
Attorneys for Intervener.

(Endorsed): No. 460, Original. Filed in U. S. Circuit Court of Appeals on June 22, 1944.

(Order Directing Clerk to Send Certain Original Exhibits to Supreme Court of the United States.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1944.

Monday, June 26, 1944.

Eagle-Picher Mining & Smelting Company, a Corporation,
and Eagle-Picher Lead Company, a Corporation,
Petitioners,

No. 460. vs. Original

National Labor Relations Board, Respondent,
and

International Union of Mine, Mill and Smelter Workers,
Locals No. 15, 17, 107, 108 and 111, affiliated with
the Congress of Industrial Organizations, Intervener.

In this matter counsel for the Intervener have filed motion for an order of this Court permitting the Clerk to transmit to the Supreme Court of the United States original Board's Exhibits 237, 238, 239, 260, 261 and 262. Such exhibits are very voluminous and it being impracticable to make copies thereof and the Clerk's fees would be prohibitive, It is Ordered by the Court that the Clerk be, and he is hereby directed to transmit said exhibits to the Supreme Court of the United States with a request that same be returned to this Court after consideration and disposition of petition of the Intervener herein for a writ of certiorari to be directed to this Court.

June 26, 1944.

(Motion of Intervener for Order to Transmit Original Typewritten Transcript of Record to Supreme Court, U. S.)

Come now the above-named interveners and show to the Court that they intend to apply to the Supreme Court of the United States for a Writ of Certiorari to review the decision and orders of this Court dated April 19, 1944 and May 17, 1944; that by Rule 38, Section 7, of the Rules of the Supreme Court, it is required that a certified transcript of the record be filed with the Supreme Court on such applications for writs of certiorari; that the typewritten transcript of record in the above case consists of approximately 10,000 pages and the cost of certifying the same by the Clerk of this Court at the rate of 20¢ per hundred words would prevent, by reason of the enormous cost, seeking a Writ of Certiorari.

Wherefore, your interveners pray the Court for an order authorizing the Clerk of this Court to transmit the original typewritten transcript of record filed in this cause to the Supreme Court of the United States without cost for certification.

LOUIS N. WOLF,
SYLVAN BRUNER,
Attorneys for Interveners.

(Endorsed): No. 460. Original. Filed in U. S. Circuit Court of Appeals, on Jul. 18, 1944.)

(Order Directing Clerk to Send Original Typewritten Transcript of Record to Supreme Court, U. S.)

United States Circuit Court of Appeals,
Eighth Circuit.

Eagle-Picher Mining & Smelting Company, a corporation,
and Eagle-Picher Lead Company, a corporation,
Petitioners,

No. 460. vs. Original
National Labor Relations Board, Respondent,
and

International Union of Mine, Mill and Smelter Workers,
Locals No. 15, 17, 107, 108 and 111, affiliated with
the Congress of Industrial Organizations, Intervener.

This matter comes before the Court on the motion of Intervener for an order authorizing the Clerk of this Court to transmit the original typewritten transcript of record filed in this cause to the Supreme Court of the United States without cost for certification thereof in connection with a petition of Interveners for the writ of certiorari in that Court, and the Court being advised,

.....

It Is Ordered that the Clerk of this Court is authorized to transmit the original typewritten transcript of record filed in this cause to the Supreme Court of the United States without cost for certification to be used in connection with such petition of Interveners for the writ of certiorari in that Court.

July 18, 1944.

(Letter of Counsel for Intervener and Proposed Stipulation
as to Record for Supreme Court, U. S.)

Louis N. Wolf
Lawyer
206-7 Joplin National Bank Bldg.
Joplin, Missouri

July 24, 1944.

Hon. E. E. Koch, Clerk,
United States Circuit Court of Appeals
for the Eighth Circuit,
St. Louis, Missouri,

re: 460-Original, Eagle-Picher M. & S. Co., et al.,
vs. National Labor Relations Board, and In-
ternational Union of Mine, Mill & Smelter
Workers, etc., Interveners.

Dear Mr. Koch:

Mr. John G. Madden, attorney for the Eagle-Picher Companies, has refused to sign the attached stipulation as to the record, although this is the form usually filed with the Supreme Court in labor board proceedings.

My time is running short, and I must ask you to certify the entire typewritten transcript of the record in the case along with Exhibits 237, 238, 239, 260, 261 and 262, and forward to the Clerk of the United States Supreme Court.

Also certify separately all of the matter called for in paragraphs numbered 1 to 9 of the enclosed stipulation, which will be printed.

Allow me to express my sincere appreciation for your courtesies and cooperation.

Very truly yours,

LOUIS N. WOLF.

In the Supreme Court of the United States

October Term, 1944.

International Union of Mine, Mill and Smelter Workers,
Locals No. 15, 17, 107, 108 and 111, affiliated with
the Congress of Industrial Organizations, Petition-
ers,

No. vs.

Eagle Picher Mining and Smelting Company, and Eagle
Picher Lead Company, corporations,

and

National Labor Relations Board.

Stipulation As To the Record.

Subject To This Court's Approval, It Is Hereby Stipu-
lated And Agreed by and between the attorneys for the
respective parties hereto, that for the purpose of the peti-
tion for writ of certiorari, the printed record may consist
of the following:

1. From the typewritten transcript of record filed in
this cause:

page	line	page	line	page	line
6622	17-22	6882	3-8	6993	4, 5
6626	21-22		13-17		9-11
6627	4-5	6907	9-13		15-17
6636	5-11	6909	11-13	6994	4-6
	16-23		23-25	7076	8-13
6637	4-7	6910	1-5		16-19
	11-25	6924	7-15	7087	3-6
6638	1	6929	6-17		7-10
6666	8-11	6936	25	7232	4-16
	25	6937	1-5	7413	1-7
6667	1	6945	21-25	6825	25
6672	13-23	6946	1-3	6826	1-3
6677	19-25		7-9	7233	4-8
6679	6-13		16-25		11, 12
6683	1-3	6947	1-4	7234	20-23
	6-12	6957	24, 25	7238	24, 25
6688	9-11	6958	1	7239	1-10
	16-20	6962	15-22	7261	10, 11
6689	15-22	6970	15-18		17-22
6712	16-20		22, 23	7262	11-15
6823	17-24	6983	7, 8	7272	24, 25
	25		11-15	7273	1

6834	1-11	6989	7-10	7369	24, 25
6835	1-6		13-18	7370	1-6
13459	1-9	13472	7, 8	13483	7, 8
13461	10-13		21-23	13484	1-4
	14-16	13473	21-26	13925	1
13462	10, 11	13474	1-3	13926	9, 10
13463	14-22	13476	4-6	13932	18-23
13465	23-26		8, 9	13940	8-13
	27, 28	13477	2, 3		17-28
13466	1		15-17	13941	1-12
	21, 22	13478	4, 5	13991	17, 22
13467	7, 8		8-11		25-29
	21-23		15, 16	13992	1
13468	12-15	13480	23		24-28
	17, 18	13481	1-3	13993	1-10
13470	21-23		4-6	14000	6-10
	25, 26	13482	3, 4	13924	All
13471	20, 21		17, 18		

2. The decision and order of the National Labor Relations Board dated October 27, 1939, as amended December 14, 1939.

3. Petition of the International Union, etc., to intervene filed February 10, 1940.

4. Order of the Court dated February 10, 1944, permitting the International Union, etc., to intervene.

5. All of page 215, except line 3, and all of page 216 of the Companies' Statement, brief and argument in support of its petition for review of the Board's order and decision dated October 27, 1939.

6. Opinion of the court below dated May 21, 1941.

7. Decree of the court below dated June 27, 1941, enforcing the order of the Board, and including only the portions set out in Exhibit A in the Appendix to the Board's petition for rule to show cause, to remand, etc.

8. The proceedings had before the United States Circuit Court of Appeals for the Eighth Circuit on and after February 4, 1943.

9. From the Companies' brief on the Board's petition for rule to show cause, to vacate and remand, etc., the following:

page	line	page	line	page	line
4	35-39	26	8-22	34	35-37
5	1	33	16-20	49	23-28

It Is Further Stipulated And Agreed that petitioners will cause the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to file with the Clerk of the Supreme Court of the United States the transcript of record certified and filed by the Board in the Circuit Court of Appeals; that said petitioners will file a copy of this stipulation with said Clerk; and that, in the event the petition for the writ of certiorari be granted, the printed record shall consist of the proceedings in the court below and such portions of the entire transcript of record as certified by the Board to the Court below as the respective parties may designate.

It Is Further Stipulated And Agreed that the parties may refer to the portions of the certified typewritten transcript of the record and exhibits 237, 238, 239, 260, 261 and 262 not included in the printed record.

Dated at Joplin, Missouri, this day of July, 1944.

.....
Attorneys for International Union
of Mine, Mill & Smelter Workers,
etc., Petitioners.

Dated at Kansas City, Missouri, this day of July,
1944.

.....
Attorneys for Eagle-Picher Mining
& Smelting Company and Eagle-
Picher Lead Company.

Dated at Washington, D. C., this day of,
1944.

.....
Solicitor General of the United
States.

(Endorsed): No. 460, Original. Filed in U. S. Circuit
Court of Appeals, on July 26, 1944.

(Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains extracts from the transcript of the record of the National Labor Relations Board and full, true and complete copies of the pleadings, record entries and proceedings, including the opinions; had and filed in the United States Circuit Court of Appeals, as prepared in pursuance of praecipe filed by counsel for the Intervener, in the matter of Eagle-Picher Mining and Smelting Company, a corporation, and Eagle-Picher Lead Company, a corporation, Petitioners, vs. National Labor Relations Board, Respondent, International Union of Mine, Mill and Smelter Workers, Locals No. 15, 17, 107, 108 and 111, Intervener, No. 460, Original.

I do further certify that in pursuance of the orders of said Circuit Court of Appeals in said cause of June 26th and July 18th, 1944, I transmit herewith to the Supreme Court of the United States the original typewritten transcript of the record from the National Labor Relations Board consisting of 9 volumes, and the certain original exhibits from said Board called for.

And I do further certify that in the foregoing is included a full, true and complete copy of the letter of counsel for the Intervener with attached proposed stipulation as to record not entered into.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 26th day of July, A. D., 1944.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5528)

FILE COPY

No. _____

337

CHARLES CLARK COPIES
CLARK

IN THE
Supreme Court of the United States

October Term, 1944.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS No. 15, 17, 107, 108 and 111, affiliated
with the Congress of Industrial Organizations,
Petitioners,
against

EAGLE-PICHER MINING AND SMELTING COMPANY, a corpora-
tion, EAGLE-PICHER LEAD COMPANY, a corporation,
and

NATIONAL LABOR RELATIONS BOARD.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

LOUIS N. WOLF,
SYLVAN BRUNER,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1944.

No. ----:

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS No. 15, 17, 107, 108 and 111, affiliated
with the Congress of Industrial Organizations,
Petitioners,

against

EAGLE-PICHER MINING AND SMELTING COMPANY, a corpora-
tion, EAGLE-PICHER LEAD COMPANY, a corporation,

and

NATIONAL LABOR RELATIONS BOARD.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The Petitioners, intervenors in the Court below (R. 185),
pray that a writ of certiorari issue to review the decision
and orders of the United States Circuit Court of Appeals
for the Eighth Circuit (1) denying the motion of the Na-
tional Labor Relations Board for judgment on its petition

to vacate portions of the back pay provisions of the decree and to remand and dismissing the petition, said decision and order being entered April 19, 1944, rehearing denied May 17, 1944, and (2) denying the motion of the Petitioners to modify the decree or to remand; said order also being entered on May 17, 1944.

The Petitioners also move that, should the writ issue, the decision and orders of the Court below be simultaneously reversed with directions either to modify, or vacate paragraphs 2 (d) and 3 (b) of the decree and remand to the Board so much of this cause as is affected by said paragraphs for further proceedings.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals denying the Board's motion for judgment on its petition to show cause, to vacate back pay provisions of the decree and to remand (R. 307-311) is reported in 141 F. (2d) 843. The memorandum opinion of the Court below granting the Board permission to file said petition to show cause, etc. (R. 281) is not reported. The order of the Court below denying the motion of the petitioners to modify the decree or to remand (R. 343) was made without opinion. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 25-180) are reported in 16 N.L.R.B. 727-882. The opinion of the Court below enforcing said findings of fact, conclusions of law, and order of the Board dated May 21, 1941 (R. 187-208), is reported in 119 F. (2d) 903.

JURISDICTION.

The decision and order of the Circuit Court of Appeals denying the Board's motion for judgment on its petition to vacate and to remand and dismissing its petition was entered on April 19, 1944 (R. 307-312), rehearing denied May 17, 1944 (R. 343). The order of the Court below denying the motion of the Petitioners to modify the decree, or to remand was entered May 17, 1944 (R. 343): The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are set out in the Appendix.

QUESTIONS PRESENTED.

1. Does the authority of the National Labor Relations Board to make all findings of fact and to determine the means whereby the effects of prior unfair labor practices are to be expunged terminate with the entry of a decree enforcing its order, so that thereafter, when the Board determines from facts appearing for the first time during compliance negotiations that the unexecuted provisions of the decree must be modified in order to achieve the remedy intended, and so represents to the Court in a petition to vacate and remand, the Court may substitute its appraisal of the old and new evidence and of the effectiveness of the old decree for that of the Board?

2. In making its order for restitution of future wages likely to be lost during the discrimination period following the close of the hearing before the Board's trial examiner, the Board was forced to prognosticate the future employment situation and to base such back pay provisions upon hypothesis instead of proven fact. Did the Court below act improperly in refusing to modify or to vacate and remand such back pay provisions when the facts as they materialized differed from those hypothesized by the Board?

3. Does the existence of a mathematical mistake in the Board's formulation of the back pay remedy, embodied in the decree, warrant modification or remand of the back pay provisions of the decree so as to fulfill the Board's intent and purpose to "make whole" the 209 workmen concerned?

STATEMENT.

Upon the usual proceedings, the Board on October 27, 1939, issued its findings of fact, conclusions of law, and order (R. 25-180), which may be summarized as follows:

Several attempts during 1934 and early 1935 of the International Union; Petitioners herein, to bargain collectively with the Companies and other employers had ended in failure. On May 8, 1935, the International Union called a strike, closing virtually all mines, mills and smelters in the Tri-State District of Southwestern Missouri, Northeastern Oklahoma and Southeastern Kansas, including all operations of the Companies. (R. 39; 16 N.L.R.B. 741).

Operators and employees, mostly supervisory, soon started a back-to-work movement. A new organization was formed to "stamp out" the International Union. It was called the Tri-State Metal, Mine & Smelter Workers Union, and was later known as the Blue Card Union of Zinc & Lead, Mine, Mill and Smelter Workers. A mine operator, F. W. Evans, was president. The executive board consisted of mine foremen, superintendents, and managers. Its funds came from mining companies. The Eagle-Picher Companies, through George Potter, vice-president, made payments to the said Tri-State Union of \$17,500, one of \$2,500 on July 8, 1935, during the strike, and three days after the National Labor Relations Act came into force. (R. 40, 42, 49, 64-69, 73, 47, 50-51; 16 N.L.R.B. 742, 744, 751, 766-771, 775, 749, 752-753).

The Tri-State Union hired 75 to 100 men, some of them convicted felons, furnished them with weapons, and had them patrol the district in squad cars. They stopped International Union men, attacking, "blackjacking, beating, kidnapping and "jailing" them. The president of the Treece local was shot. The International hall at Treece, Kansas, was wrecked in a demonstration organized by supervisors of the Companies. (R. 48, 60-61, 62, 63; 16 N.L.R.B. 750, 762-763, 764, 765).

The back-to-work movement succeeded and the Companies resumed operations on or about June 10, 1935, before the effective date of the Act, with the exception of the Galena smelter and the Big John mine, which did not reopen until July 16, 1935. (R. 93; 16 N.L.R.B. 795).

Representatives of the International Union after July 5, 1935, sought settlement of the strike and a return to work. Conferences with Vice-President Pötter failed. A substantial number of claimants individually sought reemployment, but were refused. The claimants were at all times after July 5, 1935, willing to return to work in the absence of illegal conditions. (R. 110; 16 N.L.R.B. 812).

The Companies' consistent policy was to deny employment to active International Union members and to require membership in the Tri-State Union, even of their supervisory employees and all personal managers. All applicants for membership in the Tri-State had to be recommended either by their former employer or by some member of the executive board. This board was composed of supervisory employees of the Companies and other mine operators. The Companies used the Tri-State (later Blue-Card) Union as an employment agency, and by the policies of this Union excluded all workers suspected of sympathies for the International Union. (R. 51-55, 89-91, 98; 16 N.L.R.B. 733-757, 791-795, 800).

The Board found that the imposition of the illegal conditions of reinstatement constituted unfair labor practices and violated Section 8 (1) and (3) of the Act. (R. 165-166; 16 N.L.R.B. 867-868).

In fashioning a back pay remedy, the Board stated that its objective was to restore the situation as nearly as possible to that which would have obtained but for the illegal discrimination. The Board declared that it ordinarily ordered the offending employer to reinstate the employees discriminatorily refused reinstatement and to make them whole with back pay. In the instant case, the Board was faced with the Companies' defense that they could not take

back or reinstate the claimants because an insufficient number of jobs were available for them after July 5, 1935, the effective date of the Act (R. 132, 100-103, 29 (footnote 6), 18-21, 23, 6-9, 17; 16 N.L.R.B. 731 (footnote 6), 834, 802-805). In particular, the Companies made the following specific representations:

That the number of men essential to their operations after the strike was reduced (1) by more than 2/7ths due to invalidation of the N.R.A. (R. 10-11, 100-101, 186), (2) by sale and shutdown of some of its mines (R. 11, 12, 13, 14, 16, 186), (3) by changes in methods of operation (R. 14, 10, 12, 15, 16), (4) by elimination of specific jobs (R. 14, 15, 186); further, that they were taking back old employees predominantly, and that as former employees applied, most of the new men were eliminated in a short period of time (R. 17-18); that of the crew of men working after the strike, over 90 percent were on the pre-strike payrolls of May 8, 1935 (R. 9); that their properties were in normal operation prior to July 1, 1935 (R. 17-18). Finally, the Companies represented to the Board that as to each of the claimants "there is no evidence that said person's former employment or any employment with the respondents, or either of them, was available on or after July 5, 1935," and "ignores the evidence of respondents' requirements and availability of work" (R. 100-103, 132; 16 N.L.R.B. 802-805, 834; Exceptions to Intermediate Report Nos. 119, 120, 121, 122, 123, 124, R. 18-21).

These representations led the Board to the following conclusions:

* * * had the respondents acted lawfully in re-staffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of claimants discriminated against would have returned. (R. 132; 16 N.L.R.B. 834).

The assumption that there were not enough jobs available for all claimants had as a consequence two difficulties. The first difficulty was that there was no way of determining which of the 209 claimants would have found reemployment, and, therefore, which of them should be granted back pay. The Board decided to overcome this difficulty by apportioning the presumptive total of earnings of so many of the claimants as would have obtained jobs after July 5, 1935, among all of the claimants as a group. The second difficulty was the computation of this total. To solve the second difficulty, the Board devised a formula. Under this formula it was assumed that of the total number of jobs opening at the Companies after July 5, 1935, a proportionate number would have gone to claimants; in the ratio of their number to that same number plus the number of all other old employees reapplying for jobs on and after July 5, 1935 (R. 132-134; 16 N.L.R.B. 834-836).¹

¹The provisions of the Board's formula are as follows:

"A lump sum shall be computed, consisting of all wages, salaries and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against.¹⁸⁵ The lump sum shall consist of all such monies so paid to such persons during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establishing the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents' pay rolls of May 8, 1935, who applied for work with the respondents, whether successfully or not, after July 5, 1935. Let us assume for purposes of illustration that the lump sum amounts to

Both difficulties originate from the one fact assumed by the board that there were presumably at all times less jobs open than old employees available. The Board overcame both difficulties by the one means of devising its formula (R. 132-134; 317).

In the event of full employment available for all claimants, the normal remedy of full net back pay was applicable and the formula unnecessary (R. 132; 16 N.L.R.B. 834). This was not expressly stated in the formula. But, by a Footnote 185, the Board intended to protect the Companies against paying more than the claimants as a group would have lost (R. 133). Footnote 185 provides:

If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum. (R. 133).

\$360,000, that there are 200 claimants discriminated against, and there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus, we assume that two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against. This sum is then to be apportioned among the claimants discriminated against." (R. 133-134; 16 N.L.R.B. 835-836).

This footnote contains a mistake in its formulation: it directs that the claimants *and other old employees reapplying for jobs* share proportionately in the earnings from such jobs as would have gone to claimants *alone*, instead of to the claimants and such other old employees. As a result, in a situation of full available employment for all 209 claimants, the application of Footnote 185 would allow reimbursement to them of only a part or fraction of the wages they lost, contrary to the purposes the Board stated it sought to achieve by its order (R. 132, 334-336; 16 N.L.R.B. 834). However, in view of the Companies' representations as to the employment situation, the Board never envisioned a situation of full employment for all claimants (R. 132; 16 N.L.R.B. 834, Board's Petition for Rehearing, R. 319, 323).

Pursuant to its conclusions, the Board ordered the Companies, among other relief not here material, to offer the 209 claimants reinstatement or placement on a preferential hiring list, and to "make whole" these employees with back pay (R. 169, 171; 16 N.L.R.B. 871, 873). No specific amounts of back pay were fixed in the order. Paragraphs 2 (d) and 3 (b) of the order provide merely that the Companies—

"Make whole all persons listed in Appendix A [and B] in the manner set forth above in the section entitled 'The Remedy', * * * (R. 169, 171).

On June 27, 1941, the Court below decreed (R. 187-208) enforcement of the Board's order in its entirety (110 F. (2d) 903), with modifications requested by the Board not here material (R. 208, 210, 212).

On August 23, 1941, the Companies, pursuant to the order as now enforced, offered reinstatement to the claimants, thereby fixing August 23, 1941, as the terminal date of the 6-year period of discrimination which had begun July 5, 1935 (R. 224, 338).

The Board then requested the Companies to comply with the order to "make whole" the claimants, and to furnish the Board with the basis of their computations. The Companies made their computations available to the Board on or about May 1, 1942. They tendered the sum of \$8,409.39 in purported full payment of all wages lost by the 209 employees during the 6-year discrimination period. Subsequently, the Companies asserted that no more than \$5,400.00 was due (R. 224-225, 338).

The Board thereupon examined and analyzed the pay rolls and records of the Companies to verify the accuracy of the Companies' computations, as is its usual practice. However, these payrolls and records are not now and never have been made a part of the record in the court below. This examination and analysis was completed in October, 1942 (R. 225, 338). In the Board's own words, it "disclosed the fact, not heretofore made known, that despite any curtailment of employment, the Companies, in their operations conducted after July 5, 1935, and during the entire period up to and including August 23, 1941, were in a position to accord full employment at all times both to all reapplicants continuing to be available for work, and to all claimants." (R. 225, 301, 338).

The Companies' representation that jobs were not available to claimants after July 5, 1935 (R. 18-21, 100-103, 132), was false (R. 225, 268-280). The Companies' evidence that most of the new men were eliminated in a short period of time (R. 17-18) was untrue (R. 268-280).

In its petition for rule to show cause, to vacate and to remand filed February 1, 1943 (R. 215-230), which the Court below considered as a "petition in the nature of a bill of review" (R. 281), the Board averred that,

* * * in the fulfillment of the statutory purpose of make whole each employee who had suffered wage deprivation in consequence of the Companies' unfair labor practices, the Companies properly should have

been required to reimburse fully each such employee.

If ultimately put into effect, the remedy herein prescribed, however interpreted, would substantially shift the loss resulting from the Companies' unfair labor practices to the employees discriminated against and relieve the Companies of a major part of their obligation, measured by the actual facts, thereby frustrating the purposes of the Act, impairing the remedial operation of the administrative judicial process created thereby and injuring the important public rights intended to be safeguarded. (R. 226-227, 228).

The Board computed the full back pay lost, after deduction of net earnings elsewhere, to amount to approximately \$800,000 (R. 227, 302-303, 339). The 209 workmen have not received any reimbursement for their lost wages, and the back pay provisions of the decree applicable to them remain unexecuted (R. 339-340, 311). Says the Board,

Apportionment among the claimants of the sum of \$5,400, now claimed by the Companies to be all that they are required to pay under paragraphs 2 (d) and 3 (b) of the Decree, would be less than three-fourths of one-percent (.0075) of the loss the Companies had wilfully caused to the 209 claimants during the said 6-year period. (R. 228).

Such is the situation facing 209 employees discriminated against after more than 8 years of administrative judicial procedure. (The Petitioners filed charges March 25, 1936, *Lyons et al. v. Eagle-Picher Lead Co.* (C. C. A. 10) 90 F. (2d) 321.)

The Board's petition prays the Court below to vacate paragraphs 2 (d) and 3 (b) of its decree and to remand to the Board so much of this cause as is affected by said paragraphs for further proceedings consistent with the facts now for the first time appearing (R. 229).

The Companies' answer to the Board's petition (R. 283-290), although challenging its sufficiency, admitted the truth

of the newly discovered evidence, to-wit: that they had jobs on and after July 5, 1935, for all 209 claimants plus all other old employees available (R. 288, 295, 301, 305-306). The Board then moved for judgment on the pleadings and the record upon the ground that no genuine issue of fact existed (R. 293-304). The Court below denied the Board's motion for judgment (141 F. (2d) 843), and on April 19, 1944, dismissed the Board's petition (R. 307-311, 312). On May 17, 1944, the Court below denied the Board's petition for rehearing (R. 343).

On the same day, May 17, 1944, the Court below, having "considered" (R. 343) Petitioners' motion to modify or to remand the back pay provisions of the decree, denied the same without opinion (R. 343). The Court had previously granted Petitioners leave to file such motion (R. 326).

Petitioners' motion (R. 329-342) asks modification or remand of the back pay provisions of the decree (1) because the Board made a mistake in setting up its formula by leaving out of Footnote 185 an element (R. 341, 334-336), as pointed out above, (2) because the employment situation following the close of the hearing had turned out to be otherwise than as prognosticated or assumed by the Board (R. 340), and (3) because the Board's newly discovered evidence as outlined above, disclosed a factual situation for which it had made no provision (R. 337).

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that it was "not convinced that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved," and thus assuming original authority to determine what remedy will bring about fair administration of the Act.

2. In refusing to remand the back pay provisions of the decree and thereby assuming original jurisdiction over the fixing of the specific amounts of wages lost and back pay to be awarded.

3. In refusing to permit modification or remand of the back pay provisions for the discrimination period following the close of the hearing before the trial examiner so as to accord with the Board's intent as expressed in its order.

4. In refusing to correct or to permit the Board to correct its mistake in formulating Footnote 185.

5. In holding that the Board departed from its normal remedy for reasons other than its understanding as to the employment situation.

6. In holding that the Board intended to award partial back pay where full wages were lost by the entire group of claimants.

7. In holding that paragraphs 2 (d) and 3 (b) of the decree should not be modified, or vacated and remanded.

REASONS FOR GRANTING THE WRIT.

1. The Board and the Court below do not agree as to the basis, meaning or adequacy of the back pay order enforced by the decree in a newly discovered and established factual situation. Two principles of law which seem to be applicable are in conflict.

On the one hand, this Court has consistently ruled that "it is for the Board not the Courts to determine how the effects of prior unfair labor practices may be expunged." *International Association of Machinists v. N.L.R.B.*, 311 U. S. 72, 82; Section 10 of the Act.

On the other hand, the exclusive function of the Board to adopt such means as will adequately effectuate the policies of the Act, is subject to "limited review" by the Courts. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U. S. 177, 194. After "enforcement" of a Board order, "the Court would not be

bound to look upon the Board's construction as its own." *J. I. Case Co. v. N.L.R.B.*, 64 S. Ct. 576, 582. In the presence of the Court's continued and exclusive jurisdiction, the Board remains without authority to deal with its order. *Ford Motor Co. v. N.L.R.B.*, 305 U. S. 364.

The conflict between these two principles is sharply presented here because of the Board's discovery of new evidence after enforcement. There is no disagreement as to the facts established by the new evidence thus discovered.

Such disagreement as exists is one which concerns the division of function between the Board and the Court below. After enforcement, is it for the Board or the Court below to evaluate primarily the effect of such newly discovered evidence? The United States Circuit Court of Appeals for the Fourth Circuit in *American Chain & Cable Co., Inc. v. Federal Trade Commission*, *infra*, has answered this question one way, the Court below has answered it the other way. Who is to prevail; the Board on the basis of the principle that in the exercise of its administrative function as an expert it should determine how the effects of prior unfair labor practices shall be expunged, or the Court below on the basis of the principle that the remedy after enforcement becomes its own? Here, too, the principles applied by the Circuit Court of Appeals for the Fourth Circuit and the Court below are in conflict.

Various aspects of this problem permeate the discussion that follows. No explicit answer can be found in the Act itself. This issue has not been, but should be, decided by this Court.

2. Even in the ordinary situation, uncomplicated by the discovery of new evidence, it has been held by the Second Circuit in *N.L.R.B. v. New York Merchandise Co.*, 134 F. (2d) 949, and by the Sixth Circuit in *N.L.R.B. v. Newberry Lumber & Chem. Co.*, 123 F. (2d) 831, that an order of the Board prescribing generally the method for determining back pay, as in the instant case, but not specifically fixing the amount thereof, is interlocutory, and remands to the Board were ordered for the purpose of making such specific

findings. It was assumed that after enforcement the Board continues to retain authority as an administrative agency. In the *New York Merchandise Company* case, Judge Learned Hand premised the Court's ruling on the following:

At some stage of the proceeding the Board must therefore fix it (the back pay) as an original tribunal and not as the surrogate of the court.

and on the basis of this premise, the Court held:

* * * until such hearing has been had and a decision rendered fixing the amount, the employer cannot be guilty of contempt, because it is cardinal in that subject that no one shall be punished for disobedience of an order which does not definitely prescribe what he is to do. (134 F. (2d) l. c. 952.)

Similarly, this Court in the *Phelps-Dodge Corporation* case remarked that back pay matters "should not be left for final settlement in contempt proceeding." A different view expressed by the Ninth Circuit in *N.L.R.B. v. Carlisle Lumber Co.*, 99 F. (2d) 533, adds to the confusion noted in the *New York Merchandise Company* case with "consequences", says Judge Hand, "which we think have not yet been fully realized."

Contrary to the foregoing decisions of the Second and Sixth Circuits, and in conflict with them, the Court below seems to hold that by its order of enforcement it had acquired and is retaining unlimited jurisdiction to fix ultimately the specific amounts of back pay. This is emphasized when the Court apparently applies common law rules relating to petitions in the nature of a bill of review to these proceedings (R. 281), which would invoke original and unlimited jurisdiction. But, a proceeding under the National Labor Relations Act is statutory, unknown to the common law (*N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48), and in fashioning an order, it is "wrong to fetter the Board's discretion by compelling it to observe conventional

common law or chancery principles." *Virginia Elec. & P. Co. v. N.L.R.B.*, 319 U. S. 533, 543.

The Court below, in so holding and by refusing to remand, left the Board no domain within which it might function as an agency for determining originally the specific amounts of back pay "in the light of its administrative experience and knowledge." *Virginia Elec. & Power Co.*, *supra*.

3. Particularly, where new evidence is discovered following the entry of an order, all former decisions seem to hold that a remand to the Board is necessary in the interest of a fair hearing and to permit the Board to function within the domain of its granted powers to find the facts, appraise their effects, and fashion a remedy. *Phelps Dodge Copr.*, *supra*; *N.L.R.B. v. Indiana & Michigan Elec. Co.*, 318 U. S. 9. This principle is as applicable after enforcement as before.

Directly in conflict with the decision of the Court below is the ruling of the Fourth Circuit in *American Chain & Cable Co., Inc. v. Federal Trade Commission*, — F. (2d) —, decided May 29, 1944, not yet reported. The power of an administrative agency to modify an order after affirmation by a reviewing court was upheld, and the appraisal of all facts was left to the administrative agency, the Court saying:

To hold otherwise would be to clothe the Circuit Courts of Appeals with the administrative power of the Commission in cases in which they have entered decrees of enforcement.

Compare, *Herzfeld et al. v. Federal Trade Commission* (C. C. A. 2) 140 F. (2d) 207, 209.

4. Irrespective of any other considerations, the back pay order enforced by the decree was subject to modification or remand for the discrimination period following the close of the hearing before the Board's trial examiner.

This hearing commenced on December 6, 1937, and ended on April 29, 1938 (R. 27). The findings, conclusions, and order of the Board were entered October 27, 1939 (R. 25). The Board found that the discrimination period began July 5, 1935, and since offers of reinstatement were made by the Companies on August 23, 1941 (R. 224), after "enforcement", the back pay period ends on that date. Therefore, the back pay order in part operated prospectively for a continuing period in the future—after April 29, 1938, to August 23, 1941: "In thus striving to restore the status quo, the Board was forced to use hypothesis and assumption instead of proven fact." *F. W. Woolworth Co. v. N.L.R.B.* (C. C. A. 2) 121 F. (2d) 658, 663.

The Board assumed that "at all times there were less jobs open than old employees available." (R. 132; 16 N.L.R.B. 834). This assumption turned out to be false (R. 225, 268-280), a fact not disputed (R. 288, 293, 301, 305-306). The remedy here prescribed in advance fails to achieve its purpose in the employment situation as it actually developed (R. 340, 227, 228, 303). Dealing with this special problem, the Second Circuit stated in the *Corning Glass Works v. N.L.R.B.*, 129 F. (2d) 967, 1. c. 972:

It is true that, in proper circumstances, the continuing nature of the back-pay order may call for adjustment because of new facts which have occurred after the conclusion of the Board's hearing which led to the entry by the Board of such an order.⁵

⁵ Similar need for adjustment, because of changed circumstances may arise in connection with an injunction decree (*United States v. Swift & Co.*, 286 U. S. 106, 114-115) or a decree for alimony (10 C. J. 273ff).

Recognizing the possibility of change, this Court in *Franks Bros. v. N.L.R.B.*, 64 S. Ct. 817, 819, stated:

For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to

new situations that may develop. * * * the Board may, in proper proceedings and upon a proper showing, take steps in recognition of changed situations * * *

Here, also, the Board's order enforced by the decree at least in so far as it affects the back pay period following the close of the hearing, is prospective and based upon assumption and could not be intended to fix permanently the remedial relief of back pay for such period *without regard to the actual facts which might develop*. *N.L.R.B. v. New York Merchandise Co.*, supra; *N.L.R.B. v. Newberry Lumber & Chem. Co.*, supra; *Corning Glass Works* case, supra; *Phelps-Dodge Corp.* case, supra; *Indiana & Michigan Elec. Co.* case, supra. No Act of Congress could endow an administrative agency with such clairvoyant powers.

5. Faced with such newly discovered evidence, the Board took "steps in recognition of the changed situation" (*Frank's Bros.*, supra) and filed its petition to vacate the back pay provisions of the decree and remand them to the Board for reconsideration in the light of such new evidence (R. 215-230). The Board's petition was premised upon the ground that it had erroneously been led to believe that "there were presumably at all times less jobs open than old employees available" (R. 132; 16 N.L.R.B. 823) and that such assumption was the sole determining factor causing it to devise the lump-sum formula (R. 132).

On this point also the Board and the Court below disagreed. The reason the Board gives for invoking its formula finds substantial support in its decision which describes at great length what the objective is, how it is ordinarily achieved and how the peculiar factual situation here presents unusual difficulties (R. 132, et seq.; 16 N.L.R.B. 834, et seq.). However, the Court below holds that the Board shaped its remedy because of "many circumstances other than the uncertainty about the number of men required in the operations after July 5, 1935." (141 F. (2d) 1 c. 844). No such other circumstances are mentioned in the Board's

decision, none appear in the entire record, and the Court specifies none. All difficulties of the Board disappear when there are enough jobs available for all claimants after July 5, 1935.

We thus are confronted with the paradoxical situation that the Court below is telling the Board why it, the Board, did what it did, and refuses to accept the Board's prior explanations to the contrary, although these explanations, and only these, are supported by evidence. Since the Board is required to "disclose the basis of its order" (*Phelps-Dodge Corp.*, supra, 313 U. S. l. c. 197), its findings and inferences when supported by evidence should be as conclusive after enforcement as before. Section 10 (a), (c), (e) and (f).

This conflict between Board and Court has an important bearing on the question whether the formula is applicable in a newly discovered employment situation. The Board declares, as the wording of its decision indicates, and as it emphatically points out in its petition for rehearing, that its formula was never intended to be applied in a situation of full available employment for the claimants (R. 319, 323).

6. If applied to a situation of full available employment for all 209 claimants, the formula, by reason of Footnote 185, prevents the claimants from being made whole for their losses either individually or in the aggregate (R. 228). Thus, Footnote 185, a subordinate part of the formula, would prevent the restoration of the situation as nearly as possible to that which would have obtained but for the illegal discrimination, contrary to the intent of the Board as expressed in its decision (R. 132; 16 N.L.R.B. 834). As the Board, in its petition for remand, asserts,

If ultimately put into effect, the remedy herein prescribed, however interpreted, would substantially shift the loss resulting from the Companies' unfair labor practices to the employees discriminated against and relieve the Companies of a major part of their obligation, measured by the actual facts, thereby frustrating

the purposes of the Act, impairing the remedial operation of the administrative judicial process created thereby and injuring the important public rights intended to be safeguarded. (R. 228).

In Petitioners' motion to modify or to remand, we specifically analyze and demonstrate by examples that the footnote, in any event, contains a mistake in its formulation (R. 334-336; especially Par. 11, a, b, c).

This mistake of the Board may be characterized as inadvertent. Even when applied to an intermediate employment situation, i. e., where the number of new or reinstated employees exceeds the number of claimants, but is less than full employment for all claimants (R. 335, par. 11, c), the footnote brings about a result never intended by the Board. The right of the Board or the parties to modification, correction, or remand of orders of administrative agencies containing inadvertent mistakes or irregularities is essential to fair administration. *Ford Motor Co. v. N.L.R.B.*, 305 U. S. 364.

7. The Act assures employees immunity for conduct it makes lawful. This assurance can carry weight only if in every case it is followed by remedial action undoing fully the ill effects suffered by employees as a result of employers' unlawful conduct. Section 1; *Virginia Elec. & P. Co.*, supra; *Corning Glass Works*, supra; *Phelps-Dodge Corp.*, supra; *N.L.R.B. v. Waumbeec Mills* (C. C. A. 1) 114 F. (2d) 226. These results the Board sought to achieve when it stated in its order,

The objective is, of course, to restore the situation as nearly as possible to that which would have obtained but for the illegal discrimination. (R. 132; 16 N.L.R.B. 834).

Under the new evidence the Board has estimated that in the instant case the 209 workmen have lost approximately \$800,000 in wages as a result of the Companies' discrimination (R. 227). In attempting to make restitution, however,

the Board was bound to consider its own order enforced by the decree. Not only were the back pay provisions it had set up based on erroneous assumptions, but the complicated formula, here designed and invoked for the first time (*Fifth Annual Report, N.L.R.B.*, p. 74), also contained hidden mistakes demonstrable only when applied to conditions as now established, mistakes enabling the Companies to compute \$8,409.39 to be the back pay due (R. 225, 338). The Board and the parties aggrieved therefore appealed to the Court below for a remand.

The Court refused to remand. The Court disagreed with the Board's views and interpretations throughout. By claiming jurisdiction in a broad and summary manner, the Court below left no domain within which the administrative competence might function. Sec. 10 (a). The Board is left to apply a remedy which it has declared will not effectuate the policies of the Act.

And this is the situation which 209 workmen face after the protection of their rights has been held in abeyance during more than eight years of proceedings.

CONCLUSION.

It is respectfully submitted that for the reasons stated, the petition for writ of certiorari should be granted.

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August, 1944.

APPENDIX.

1.

NATIONAL LABOR RELATIONS ACT.

(Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. v. Sec. 151, et seq.).

AN ACT To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY.

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be unfair labor practices for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

• • •

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: • • •

PREVENTION OF UNFAIR LABOR PRACTICES.

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, • • •

(b) * * * In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring that such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

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No. 337.

Office - Supreme Court, U. S.

FILED

SEP 28 1944

CHARLES ELABRE SIMPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORK-
ERS, LOCALS NO. 15, 17, 107, 108 AND 111, AFFILIATED
WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Petitioners,

v.

EAGLE-PICHER MINING AND SMELTING COMPANY, A CORPORA-
TION, EAGLE-PICHER LEAD COMPANY, A CORPORATION, AND
NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Eighth-Circuit.

PETITIONERS' REPLY BRIEF.

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Joplin, Missouri,

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Pittsburg, Kansas,
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NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY BRIEF.

The Companies' brief in opposition to granting certiorari
raises new issues which warrant a reply.

QUESTIONS PRESENTED.

The Companies state that "the respective authority of the Board and the court below" is not "involved" and that "the court merely held there was no factual basis for any one of these three alleged questions presented" (E. P. Br. 2). It is the authority of the court to make precisely such an independent original judicial determination of facts that petitioners question.

STATEMENT.

The Companies claim that the facts disclosed by the new evidence were known to the Board and to the court at all times. Their discussion of the Board's and of the court's original decisions contains inaccuracies and contradictions.

They state repeatedly that "immediately after July 5, 1935, 364 jobs opened up, which were available for the 209 claimants" (E. P. Br. pp. 5, 6, 7, 13). However, they omit to state that the claimants would have had to share these 364 jobs with all other old employees returning to work after July 5, 1935 (called "reapplicants" by the Board, R. 298; Bd. Mem. 7). Since these 364 jobs were not exclusively available for the 209 claimants, and since there were over 500 old employees who had not returned to work by July 5, 1935 (R. 132), it appeared there were not enough jobs available for all claimants and reapplicants. This result, that there were not enough jobs available for all, is in accord with the Companies' original claims (R. 10-18, 19-21). Based upon these claims and evidence of the Companies, the Board concluded that "at all times there were less jobs open than old employees available" (R. 132), and that "we cannot assume that they [claimants] and only they would have been given these jobs had the respondents acted lawfully" (R. 133-134).

Similarly, on page 5 of their brief the Companies state:

Thus there was no doubt in the mind of the then Board or of the court below that immediately after

July 5, 1935, there was available employment for the 209 claimants.

As shown above, the Board made no such finding. In support of their statement, the Companies quote from 119 F. (2d) 1. c. 913, 914, as follows (E. P. Br. 5):

On July 5, 1935, the petitioners were operating with about 500 men. Their operations were not fully manned, and the evidence is that some men were taken on, so that by November 1, 1935, they were employing 864 men. The Board found, justifiably, that petitioners from July 5, 1935, to November 1, 1935, had jobs available.

This Court is of the opinion that if the evidence sustains the Board's finding that the striking employees would on July 5, 1935, or thereafter while jobs were available, have applied for reinstatement and would have returned to work except for the illegal condition of reinstatement imposed by petitioners, the Board had authority to make an appropriate order with respect to reinstatement and back wages.

An important passage is omitted from the midst of this quotation (119 F. (2d) 1. c. 913):

* * * The Board determined that, in the absence of the unfair labor practice of petitioners in imposing an illegal condition upon reinstatement (membership in the Tri-State Union), they would have put back to work and paid wages to *a portion of the group* affected by the reinstatement and back wage provision of its order. * * * (R. 203)

The expression "a portion of the group," which we italicize, is the essence of the entire quotation. It demonstrates once more that the Board and the court founded their decisions upon the primary assumption that there were "less jobs open than old employees available."

¹ That this assumption was false was first discovered during compliance proceedings when the Board examined the Companies' pay

Also, on page 13 of their brief all reference to other old employees (reapplicants) is omitted:

The proceeding below was instituted exclusively upon the theory that the Board was mislead into, or fell into the inadvertent error of, believing that on and after July 5, 1935, the new jobs opening up in the plants of these respondents were insufficient to furnish employment to 209 claimants. The record clearly shows that the evidence established, that these respondents conceded, that the Board found, that the court below held, that either 364 or 366 jobs opened up immediately after July 5, 1935. Hence the Board, the present petitioners, these respondents, and the court below, at all times, knew that available jobs exceeded the number of claimants. Under these circumstances the claim of deception or inadvertent error was a plain and frivolous absurdity which the court below properly denied.

But, the fact cannot be obscured that these 364 jobs were not available for the claimants alone, but would have been shared by claimants and reapplicants, numbering over 500 in all. The Companies are fully aware that this was the assumption of the Board, for on page 5 (bottom line) of their brief, they say:

... all pre-strike employees would have enjoyed equal rights but all could not have been rehired; ...

and on page 25 of their brief, they continue:

The original Board properly held, however, that, in view of the reduced employment level, there was no certainty that the 209 claimants would have received 209 of these available positions if there had been no discrimination whatsoever. That was the whole basis of the formula of the original board.

ARGUMENT.

1. The printed record complies with Rule 38 (7) and (8). It is complete and adequate. The Board prepared and submitted a printed record for the present controversy in the court below (R. 231-280). This entire printed record below is included in the printed record here, as well as all proceedings in that court and opinions there (R. 187-208, 213-230, 231-280, 281, 282, 283-290, 291-304, 306, 307-312, 313-324, 329-342 343-351). Furthermore, all findings, etc. of the Board reported in 16 N. L. R. B. 727-882, and the decree affirming them, 119 F. (2d) 903, are printed here (R. 25-180, 181-182, 187-208). In addition, the typewritten transcript on review and enforcement is now on file in this Court (R. 351), "with full opportunity to all parties to refer to any portion thereof" (Motion of Petitioners, 2).

The Solicitor General on behalf of the Board agreed to the sufficiency of the printed record (Motion of Petitioners, 2), and on this basis made a thorough analysis of all issues. While the Companies claim that the printed record is inadequate, and on page 4, note 1, of their brief state,

References to the typewritten transcript, unprinted, will be thus designated (Tr. 1).

their brief in opposition does not contain a single citation to that transcript. They refer only to the printed record.

Counsel for the Companies on several occasions during July, 1944, were asked to designate any additional portions of the transcript for printing. They did not do so, although a draft of the petition for certiorari was furnished them nearly three weeks before it was filed. They now make no such designation. However, that opportunity is still open to them. In accordance with the stipulation proposed by petitioners and agreed to by the Solicitor General, petitioners are perfectly willing to print any additional material "the respective parties may designate" (R. 350).

2. The Companies claim that "petitioners are without capacity to maintain the application for certiorari" (E. P. Br. 16). This claim is contrary to Section 240 (a) of the Judicial Code, authorizing, in a circuit court of appeals case, the issuance of a writ of certiorari "upon the application of any party thereto." See, Section 10 (e) of the National Labor Relations Act. Petitioners were at all times parties. They were parties before the Board (R. 27).² They were parties in the court below on review and enforcement (R. 187; 119 F. (2d) 903). They were parties below on the Board's petition to remand (R. 306, 307; 141 F. (2d) 843). They were parties when they were granted leave by the court to file their motion (R. 326). They were parties when their motion was considered (R. 343).

Moreover, Section 10 (f) of the Act authorizes "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" to institute proceedings. The Act here has reference to employees or their organizations, since only they could be aggrieved by an order denying relief. *Jacobsen v. National Labor Relations Board*, 120 F. (2d) 96, 100 (C. C. A. 3). That petitioners are "aggrieved litigants" is not denied by the Companies (E. P. Br. 24).

Amalgamated Utility Workers, etc. v. Consolidated Edison Co., 309 U. S. 261, and *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, discussed by the Companies, are not in point. In *National Licorice Company*, the claim was made by an employer that employees *must* be brought into the case as parties, and the issue was not whether employees who are parties *may* be aggrieved. The *Amalgamated* case denied a union the right to institute contempt proceedings to "enforce" a final order. In the instant case, however, petitioners seek to set aside, they

² Article II, Sec. 5, of the Rules and Regulations of the National Labor Relations Board: "After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties') a formal complaint in the name of the Board * * *"

"contest" an order.³ The Companies' statement that petitioners are "seeking enforcement by vacation of a decree" (E. P. Br. 18) is a contradiction in terms.

3. All other matters contained in the Companies' brief in opposition are fully answered in the memorandum filed by the Solicitor General.

Respectfully submitted,

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September, 1944.

³ The Court in the *Amalgamated* case, 309 U. S. 261, 268, based its decision on the fact that the procedure provided in the National Labor Relations Act was analogous to that provided by Section 5 of the Federal Trade Commission Act without mentioning that with respect to the persons entitled to petition for review the language of the Acts differs materially. Section 5 (c) of the Federal Trade Commission Act provides that "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order * * * (15 U. S. C. Sec. 45 (c)).

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No. 337

Office - Supreme Court, U. S.

DEC 15 1944

CHARLES ELMORE GRUPLIN
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS NO. 15, 17, 107, 108 AND 111, AFFIL-
IATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZA-
TIONS,

Petitioners,

v.

EAGLE-PICHER MINING AND SMELTING COMPANY, A COR-
PORATION, EAGLE-PICHER LEAD COMPANY, A CORPORA-
TION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

LOUIS N. WOLF,
SYLVAN BRUNER,

Attorneys for Petitioners.

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Chronology

I. Proceedings leading to the order of the National Labor Relations Board.

1936, March 25.	Charges of unfair labor practices filed (90 F. (2d) 321).
1936, May 23.	N.L.R.B. complaint filed (R. 26 n. 1).
1936, June 18	Eagle-Picher Companies enjoin Board hearings (15 F. Supp. 407).
1937, May 27.	Injunction dissolved by Tenth Circuit (90 F. (2d) 321).
1937, November 8.	Amended complaint filed by Board (R. 26).
1937, December 6.	Hearings before Trial Examiner begin (R. 27).
1938, April 29.	Hearings end (R. 27).
1938, August 31.	Intermediate Report filed (R. 28).
1938, December 13.	Oral arguments on exceptions to Intermediate Report (R. 21).
1939, October 27.	N.L.R.B. decision and order (R. 25).

II. Proceedings on Review and Enforcement in the U. S. Circuit Court of Appeals for the Eighth Circuit.

1939, November 6.	Eagle-Picher Companies file petition for review.
1940, February 10.	International Union, etc., files petition for intervention (R. 184).
1940, February 10.	Order permitting International Union, etc., to intervene (R. 185).
1940, December 20.	Order of submission.
1941, May 21.	Opinion affirming and enforcing Board order filed (R. 187).
1941, June 5.	Eagle-Picher Companies file petition for rehearing.
1941, June 9	Petition for rehearing denied.
1941, June 27.	Decree affirming and enforcing Board order as modified (R. 208).

III. Post-decree proceedings.

1941, August 21.	Eagle-Picher Companies offer claimants reinstatement (R. 224).
1942, May 1.	Eagle-Picher Companies' back pay audit submitted to Board (R. 225).
1942, May 1.	Eagle-Picher Companies tender \$8,409.39 as full back pay (R. 225).

- 1942, May... N.L.R.B. undertakes investigation of Companies' pay rolls and records.
- 1942, October. N.L.R.B. completes investigation of Companies' pay rolls, etc. (R. 225).

IV. Proceedings on Petitions of National Labor Relations Board and International Union, etc., to Remand.

- 1943, February 4. N.L.R.B. petition to vacate and to remand (R. 274).
- 1943, August 9. Order permitting Board to file petition to remand, etc. (R. 281).
- 1943, September 20. Motion of Companies for leave to file plea to jurisdiction, etc. (R. 282).
- 1943, October 5. Order granting Companies leave to file plea to jurisdiction, etc. (R. 283).
- 1943, November 16. N.L.R.B. motion for judgment filed (R. 291).
- 1944, March 13. Order of submission (R. 306).
- 1944, April 19. Opinion denying Board's motion for judgment and its petition (R. 307).
- 1944, May 4. N.L.R.B. petition for rehearing filed (R. 313).
- 1944, May 11. Motion of International Union, etc., for leave to file motion to remand (R. 326).
- 1944, May 17. Order granting Int. Union, etc., leave to file motion to remand (R. 326).
- 1944, May 1. Order denying N.L.R.B. petition for rehearing (R. 343).
- 1944, May 17. Order denying International Union, etc., motion to remand (R. 343).

V. Proceedings on Review to the Supreme Court of the United States.

- 1944, August 11. Petition for certiorari filed.
- 1944, August 11. Motion for leave to proceed upon abbreviated printed record filed.
- 1944, September 9. Opposition brief of Eagle-Picher Companies filed.
- 1944, September 13. Memorandum brief of N.L.R.B. filed.
- 1944, September 26. Reply brief of petitioners filed.
- 1944, October 13. Motion for leave to file amicus curiae brief filed.
- 1944, October 13. Amicus curiae brief of Congress of Industrial Organizations.
- 1944, October 16. Certiorari granted, etc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 337

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS No. 15, 17, 107, 108 AND 111, AFFIL-
IATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZA-
TIONS,

Petitioners,

v.

EAGLE-PICHER MINING AND SMELTING COMPANY, A COR-
PORATION, EAGLE-PICHER LEAD COMPANY, A CORPORA-
TION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

OPINIONS BELOW

The opinion of the court below denying the motion of the National Labor Relations Board for judgment on its petition to vacate back pay provisions of the decree and to remand, and dismissing the petition (R. 307-311) is reported in 141 F.(2d) 843. The order of the court denying petitioners' motion to modify or to remand (R. 343) was entered without opinion. The memorandum opinion granting the Board permission to file its petition to

vacate and to remand (R. 281) is not reported. The opinion affirming and enforcing the Board's order (R. 187-208) is reported in 119 F.(2d) 903. The findings of fact, conclusions of law and order of the Board (R. 25-180) are reported in 16 N.L.R.B. 727-882.

JURISDICTION

The order denying the Board's motion for judgment on its petition to remand and dismissing the petition was entered by the court below on April 19, 1944 (R. 311-312). The Board's petition for rehearing was denied on May 17, 1944 (R. 343). The order denying petitioners' motion to modify the decree or remand was entered by the court below on May 17, 1944 (R. 343). The petition for a writ of certiorari was filed on August 11, 1944, and was granted October 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act.

THE QUESTIONS PRESENTED

1. Does the authority of the National Labor Relations Board to make all findings of fact and to determine the means whereby the effects of prior unfair labor practices are to be expunged terminate with the entry of a decree enforcing its order, so that thereafter, when the Board determines from facts appearing for the first time during its compliance investigations that the unexecuted provisions of the decree must be modified in order to achieve the relief intended, and so represents to the court in a petition to vacate and remand, the court may substitute its appraisal of the old and new evidence and of the effectiveness of the old decree for that of the Board?

2. Does the existence of a verbal or mathematical mistake in the Board's formulation of the back pay remedy,

embodied in the decree, warrant modification or remand of the back pay provisions of the decree so as to fulfill the Board's intent and purpose to "make whole" the 209 workmen concerned?

3. In making its order for restitution of future wages likely to be lost during the discrimination period following the close of the hearing before the Board's trial examiner, the Board was forced to prognosticate the employment situation which would exist after the hearing and to base such back pay provisions upon hypothesis instead of proven fact. Irrespective of any other consideration, did the court below act improperly in refusing to modify or to vacate and remand such back pay provisions when the facts as they materialized differed from those hypothesized by the Board?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT OF THE CASE

On March 25, 1936, the International Union of Mine, Mill and Smelter Workers, Locals No. 15, 17, 107, 108, and 111, petitioners, hereafter called the International Union, filed with the National Labor Relations Board charges of unfair labor practices against the Eagle-Picher Lead Company and its wholly-owned subsidiary (R. 31), the Eagle-Picher Mining and Smelting Company, hereafter called the respondents. Hearings were stopped by injunction proceedings instituted by the respondents, but the injunction was later dissolved. *Eagle-Picher Lead Co., et al. v. Madden, et al.*, 15 F. Supp. 407 (N.D. Okla.), reversed, 90 F.(2d) 321 (C.C.A. 10).

Upon an amended complaint dated November 8, 1937, hearings were held before a trial examiner from December

6, 1937 to April 29, 1938 (R. 26, 27). On October 27, 1939, upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 25-180). These may be summarized as follows:

During 1934 and early 1935 several attempts of the International Union to bargain collectively with the respondents had ended in failure (R. 39). On May 8, 1935, a strike was voted, closing virtually all mines, mills and smelters in the Tri-State District of Southwestern Missouri, Northeastern Oklahoma and Southeastern Kansas, including all operations of the respondents (R. 39).

The unfair labor practices. On May 25, 1935, operators and employees, mostly supervisory, including three foremen of the respondents (R. 40), started a back-to-work movement (R. 40-42). A new organization was formed to "stamp out" the International Union (R. 49). It was called the Tri-State Metal Mine & Smelter Workers Union, and was later known as the Blue Card Union of Zinc & Lead Mine, Mill and Smelter Workers. A mine operator, F. W. "Mike" Evans, was president. The executive board consisted of mine foremen and superintendents. The constitution of the Tri-State (later Blue Card) Union required that executive board members have "at least 5 years experience as a vice-principal (ground boss or superintendent) in the metal mines or smelters in the Tri-State Area" (R. 43-44). Three supervisory employees of the respondents were on this board (R. 51). The funds of the Tri-State Union came from mining companies. The Eagle-Picher Companies, through George Potter, their vice-president, who was in charge of labor relations for both Companies (R. 33, 47, 86), made payments to the Tri-State Union of

¹ Evans was "closely connected financially and otherwise" with the respondents (R. 48). In 1935 he acquired a mining lease from the respondents, at no cost to himself, with a short-term cancellation clause, and during the years 1935, 1936 and 1937 his gross sales of crude ore to the respondents amounted to over \$385,000 (R. 48).

\$17,500, one of \$2,500 on July 8, 1935, during the strike, and 3 days after the National Labor Relations Act came into force (R. 47, 50-51).

With those funds so disbursed by the respondents, the Tri-State Union commenced its organizational activities for the purpose of breaking the strike (R. 44). The Tri-State Union hired 75 to 100 men, furnished them with arms and other weapons, and had them patrol the district in "squad cars" to terrorize International Union members (R. 45, 48, 60-61). Some "rather top notch and notorious criminals," including "Missouri Criminal Number 1," were hired for this purpose (R. 60). At least \$5,000 of the respondents' funds was expended for squad car activities (R. 48). These squad car men stopped International Union men, attacking, blackjacking, beating, kidnaping, and "jailing" them (R. 60-63, 107). The International Union hall at Treece, Kansas, was wrecked in a "pick-handle parade" and demonstration organized by supervisors of the respondents (R. 61-62). The respondents provided the participants with free liquor and furnished them with weapons for the pick-handle parades which resulted in widespread violence, brutality and lawlessness (R. 61-62).

The back-to-work movement succeeded and the respondents resumed operations on or about June 10, 1935, before the effective date of the Act, with the exception of the Galena smelter and the Big John mine, which did not reopen until July 16, 1935 (R. 93).

Representatives of the International Unions held conferences with Vice-President Potter after July 5, 1935, seeking a settlement of the strike and a return of their members to work. These conferences with Potter failed (R. 110). A substantial number of International Union members individually sought reemployment. They were refused by the respondents because they would not give

up their memberships in the International Union and join the Tri-State Union (R. 89, 93, 110). The Board found that 209 International Union members, hereafter called claimants, were at all times after July 5, 1935, willing to return to work in the absence of illegal conditions (R. 110).

The respondents' consistent policy in their campaign to break the International Union was to deny employment to active International Union members and to impose upon them as an illegal condition of employment membership in the Tri-State (Blue Card) Union (R. 92). Indeed, Vice-President Potter's instructions from the home office in Cincinnati were to force the employees to join the Tri-State Union (R. 84, *et seq.*). Moreover, all applicants for membership in the Tri-State Union had to be recommended either by their former employer or by some member of the executive board (R. 54). As stated, this board was composed solely of supervisory employees of the respondents and other mine operators. Refusal to obtain such a recommendation for membership in the Tri-State Union was equivalent to a blacklist. The respondents thus used the Tri-State (Blue Card) Union as an employment agency by passing upon and substantially controlling its membership; by the policies of this union the respondents effectively excluded all workers suspected of sympathies for the International Union (R. 55, 92, 93).

The Board "found that the respondents, and each of them, have participated in, contributed to, encouraged, authorized, and ratified acts of violence against the International and its members" and ordered the respondents "to cease and desist therefrom" (R. 129).

It further found that the imposition upon International Union members of the above-described conditions of reinstatement on and after July 5, 1935, constituted mass

discrimination by the respondents against their employees in violation of Sections 8 (1) and (3) of the Act (R. 131-134, 166). "All of these practices, though initiated prior to the passage of the Act, were persisted in after the passage of the Act (R. 95).

The back pay order and decree. The Board determined that in order to effectuate the policies of the Act the 209 claimants discriminated against should receive reimbursement for their lost wages. In fashioning a back pay remedy, the Board stated that its objective was "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (R. 132). The Board declared that it sought to make the claimants whole with back pay (R. 132). The Board stated, however, "the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo" (R. 132). These difficulties were created by the respondents' claim that there were fewer jobs available for the claimants because other old employees had successfully reapplied for work after July 5, 1935, as well as by their contention that the curtailment of their operations following the strike had left an insufficient number of jobs available for claimants and other old employees reapplying after July 5, 1935, the effective date of the Act (R. 132, 100-103, 29 n. 6, 18-21, 23, 6-9, 17). In particular, the respondents made the following specific representations:

That the number of men needed in their operations after the strike was greatly reduced (1) by invalidation of the N.R.A. (R. 10-11, 100-101, 186),* (2) by sale and shutdown of some of their mines (R. 11-14, 16, 186), (3) by changes in methods of operation (R. 10, 12, 14-16), (4) by elimination of specific jobs (R. 14, 15, 186).

*The respondents claimed that this consideration alone reduced their personnel requirements by "more than 2/7ths" of the 1100 men on their staffs prior to the strike (R. 10-11).

In a further attempt to delimit the area of job opportunities for the claimants the respondents insisted that not only were they taking back old employees predominantly, but also that as their old employees reapplied those few new men who were on their pay rolls were rapidly eliminated (R. 17-18). Implementing this claim, the respondents contended that of the crew of men working after the strike, over 90 percent were on the pre-strike pay rolls of May 8, 1935 (R. 9). The respondents persisted in the above-described defenses after the issuance of the trial examiner's intermediate report, on the ground that as to each claimant the report "ignores * * * that there is no evidence that said person's former employment or any employment with the respondents or either of them was available on and after July 5, 1935"; that such claimant's former employment had "disappeared due to a change of operations"; and, furthermore, that such report "ignores the evidence of respondents' requirements and availability of work" (R. 18-21, 219, 100-103, 132; Exceptions to Intermediate Report, Nos. 119, 120, 121, 123, 124, R. 18-21). Finally, in order to show that the condition of severely contracted employment and job opportunities was lasting and would continue, the respondents represented as late as December 13, 1938, after the hearing, that "Mines are closing daily." (R. 22).

These representations both with respect to the curtailed employment situation as well as to the respondents' practice in restaffing their operations with old employees, led the Board to abandon its normal administrative formula for computing back pay, for it credited respondents' representations with respect to the availability of employment after July 5, 1935. Thus the Board stated (R. 132):

* * * had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have re-

turned to work, since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of claimants discriminated against would have returned, but here again, we cannot tell which ones.

And it likewise assumed that the respondents' hiring practices were as represented, for it pointed out (R. 134 n. 186) that

we make the normal assumption, based here on the respondents' actual practice, that the respondents would generally have taken back those employed by them prior to the strike, in preference to new applicants, had they acted without regard to illegal considerations.

The lump-sum formula. The Board's assumption that there were not enough jobs available for all claimants and other old employees desiring to return after the strike and after July 5, 1935, rendered its normal remedy of full back pay to each individual worker discriminated against inapplicable, for the normal remedy might well have resulted, upon the facts then understood by the Board, in imposing upon the employer a larger back pay obligation than the losses actually sustained by the workers. In order to free the employer from the possibility of such an excess liability, the Board abandoned its customary remedy and accommodated its relief to the employer's pleas. In so doing it was faced with two difficulties:

The first difficulty was that there was no way of determining which of the 209 claimants would have found re-employment absent discrimination, and, therefore, which of them should be granted back pay.* The Board sought to overcome this difficulty by apportioning the presump-

*This inference follows inescapably from the Board's assumption that there were at all times after the date of discrimination fewer jobs open than old employees available (R. 132). Directly after the date of the discrimination, July 5, 1935, the Board was confronted with the following employment situation:

tive total of earnings of so many of the claimants as would have obtained jobs after July 5, 1935, among all of the claimants as a group. The second difficulty was the ascertainment of this total sum to be distributed. To solve the second difficulty, the Board devised a "lump-sum formula" for the first time in its experience. *Fifth Annual Report*, National Labor Relations Board (Gov't Printing Office, 1940), p. 74. Since most of the jobs opening up did not require special skills or abilities, the Board assumed that the claimants, absent discrimination, would have shared in such jobs as opened up proportionately with other old employees reapplying for work, hereafter called reapplicants (R. 100, 101, 102, 132). Under the formula the lump sum therefore consisted of the total earnings from all jobs opening up at the respondents after July 5, 1935 (R. 133). It was provided that a portion of such lump sum was to be distributed to the claimants as a group according to a "governing proportion" (R. 134), namely, in the ratio of their number to the same number plus the number of all other old employees reapplying for jobs on

Prior to the strike, the respondents' complement of men amounted to (R. 94, n. 120)	1100
On July 5, 1935, old and new employees on their pay rolls amounted to (R. 94, line, 3)	595
Of this group new men numbered (R. 98)	154
So that on July 5, 1935, old employees numbered	441
And old employees not on the July 5, 1935, pay rolls totalled	659

Because of the respondents' representations as to their employment requirements and fixed hiring practices, the Board projected this perspective throughout the entire period of discrimination, and assumed that at no time could the respondents' normal practices yield jobs for all the claimants and other old employees. As has been shown, this assumption flowed directly from the respondents' evidence and representations.

and after July 5, 1935 (R. 132-134). This solved the second difficulty.

Both difficulties originate from the one fact assumed by the Board that there were and would continue to be at all times less jobs open than old employees available. By the one means of devising its lump-sum formula, the Board sought to and did overcome both difficulties in principle (R. 132-134, 317, 332-333). In short, that part of the formula so far considered reimburses fully, or "makes whole" (R. 169, 171, 210, 212), the 209 claimants collectively for all wage losses incurred by them as a group, a remedy invoked solely by reason of the respondents' evi-

*The main provisions of the formula are as follows:

"A lump sum shall be computed, consisting of all wages, salaries, and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against." The lump sum shall consist of all such monies so paid to such persons during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establishing the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents' pay rolls of May 8, 1935, who applied for work with the respondents, whether successfully or not, after July 5, 1935. Let us assume for purposes of illustration that the lump sum amounts to \$360,000, that there are 200 claimants discriminated against, and there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus, we assume that two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against. This sum is then to be apportioned among the claimants discriminated against." (R. 133-134; 16 N.L.R.B. 835-836.)

dence and representation of job insufficiency on and after the effective date of the Act.

Had the record disclosed a perspective of full employment, the Board indicated that it would have written into its order the normal back pay remedy without resort to a formula (R. 132, 222-227, 337). Just as the Board framed the formula itself in order to reduce the scope of the employer's back pay liability to the shape of the record as it then saw it, so it further sought to prevent overpayment of back pay by adding to the formula, itself addressed to a situation of reduced employment, a proviso in footnote 185 which became operative at these points during the period of discrimination when the assumed situation might be varied by employment peaks rising above the level necessary to provide jobs for both all the claimants and re-applicants. Footnote 185 provides:

If at any given time during this period [of discrimination] the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum. (R. 133.)

Thus the Board carefully sought to protect the employer from overpayment in two ways.

But this footnote, through a verbal or mathematical error in its formulation failed to give effect to its plain intention and the intention of the entire formula of confining the back pay to the actual wage losses of the claimants. It directs that the claimants and other old employees reapplying for jobs, share proportionately in the

proceeds of such jobs as would have gone to the claimants alone, instead of to the claimants and such other old employees.* Thus, the footnote omits a necessary element to its correct formulation. The Solicitor General, on behalf of the Board, suggests that "correctly worded so as to achieve the Board's objective, footnote 185 should read:

If at any given time during this period the number of new or reinstated employees then working exceeds the number of claimants discriminated against *plus the number of old employees reapplying*, only the earnings of a number of such employees equal to the number of claimants discriminated against *plus the number of old employees reapplying* shall be counted in computing the lump sum." (Bd.'s mem. pp. 11-12.)

As a result of the omission of the words italicized above, in a situation of full available employment for all 209 claimants and all other old employees reapplying after July 5, 1935, the application of footnote 185 would allow reimbursement to the claimants of only a part or fraction of the wages they lost, contrary to the purposes the Board stated it sought to achieve by its order (R. 132, 334-336).

In addition, even if footnote 185 were correctly worded, the entire formula would nonetheless be unsuited to the ordinary full employment situation, since it harbors other errors, mistakes or ambiguities likely to lead to endless litigation (Cf. Bd.'s Mem. pp. 12-13 n. 3, 23 n. 7).

Pursuant to its conclusions, the Board ordered the respondents, among other relief not material here, to offer the 209 claimants reinstatement or placement on a preferential hiring list, and to "make whole" these employees with back pay (R. 169, 171). In accordance with the Board's established practice, no specific amounts of back pay were fixed in the order (See, *Fifth Annual Report*, p.

*For detailed analysis of the mistake in footnote 185, see R. 334-337.

128, *supra*). Paragraphs 2 (d) and 3 (b) of the back pay order provide merely that the respondents—

Make whole all persons listed in Appendix A [and B] in the manner set forth above in the section entitled "The Remedy", * * *. (R. 169, 171.)

On June 27, 1941, after the usual proceedings for review and enforcement instituted on November 6, 1939 (See Chronology, had been pursued, the court below entered a decree (R. 187-208) affirming and enforcing the Board's order in its entirety (119 F.(2d) 903), with modifications requested by the Board "largely formal in character" (R. 208-212). Judge Sanborn, who presided, and who wrote the opinion for the majority, dissented in part as to the back pay order (R. 205-206).

On August 23, 1941, the respondents, in accordance with the order enforced by the decree, offered reinstatement to the claimants, excepting James Curry (R. 224 n. 7), thereby fixing August 23, 1941, as the terminal date of the 6-year period of discrimination which had begun July 5, 1935 (R. 224, 338).

The Board then requested the respondents to comply with the back pay provisions of the decree, and to furnish the Board with the basis of their computations. (R. 224). On or about May 1, 1942, the respondents made their computations [consisting of a written audit dated February 25, 1942] available to the Board (R. 225). At the same time

* Judge Sanborn expressed the view that since some of the claimants had not reapplied for work after the strike, there was no showing that they were willing to return to work; and for this reason were not entitled to back pay. A majority of the court held otherwise (R. 204). The Board specifically found that the claimants were willing to return to work (R. 110), and further, that reapplication was a useless gesture in view of the respondents' policy of excluding all International Union members (R. 98). The charges of unfair labor practices filed by petitioners on behalf of the claimants conclusively established the claimants' willingness to return to work, absent illegal conditions of employment.

See below, page 46, n. 36.

they tendered the sum of \$8,409.39, the amount computed under the audit, in purported full payment of all wages lost by the 209 claimants during the 6-year period of discrimination (R. 225). Later, the respondents asserted that no more than \$5,400 was due and owing to the claimants under the formula as they interpreted it (R. 225).

Discovery of the true employment situation. The Board thereupon undertook an examination and analysis of the pay rolls and records of the respondents to verify the accuracy of their audit and tender, as is its usual practice (R. 225). These payrolls and records, of course, were not a part of the record in the court below or in the proceedings before the Board. The Board's investigations and analysis required the services of numerous members of its staff for a period of several months (R. 225, 338). In the Board's own words, "it disclosed the fact, not heretofore made known," that " * * * despite any curtailment of employment, the Companies, in their operations conducted after July 5, 1935, and during the entire period up to and including August 23, 1941, were in a position to accord full employment at all times both to all reapplicants continuing to be available for work, and to all claimants" (R. 225, 301, 338),^{*} and further, that "the Companies had been continuously employing a total number of new employees equal to and at times substantially in excess of the total number of claimants and available reapplicants and had paid wages to said new employees in a sum equal to and at times in excess of the aggregate amount which they normally would have paid to the claimants and available reapplicants" (R. 225-226).

^{*} "With the exception that the Mining Company, at its Tri-State mines during the week ending September 10, 1936, and at its smelter located in Galena, Kansas, during 33 isolated weeks in the period from July 5, 1935, to August 23, 1941, was in a position to employ on the average at least 95 percent (instead of 100 percent) of the total number of claimants and available reapplicants" (R. 225, n. 8).

The respondents' evidence that most of the new men were eliminated in a short period of time (R. 17-18) was untrue (R. 225-226). Its evidence that of the crew of men working after the strike, over 90 percent were on the pre-strike pay rolls of May 8, 1935 (R. 9) was false (R. 225-226, 268-280). The respondents' representation that after July 5, 1935, jobs were not available for the claimants (R. 18-21, 100-103, 132) was untrue (R. 225, 268-280).

The Board's petition to remand. Upon the basis of this evidence establishing the true employment situation, the Board on February 1, 1943, filed its petition to vacate the back pay provisions of the decree affecting the 209 claimants, and to remand so much of the case as was affected by such provisions (R. 215-230). Accompanying the petition the Board filed, in an Appendix, its verified (R. 230, 226) compilations disclosing the employment situation as it actually existed and developed (R. 268-280). The Board's petition to remand was premised on these principle considerations: (1) that it had granted back pay to the 209 claimants upon the assumption that there were at all times after July 5, 1935, less jobs open than old employees available (R. 221); (2) that solely for this reason the Board departed from its normal remedy and granted back pay to the claimants as a group to be computed under the lump sum formula (R. 222; *supra*, p. 9); (3) that contrary to its previous assumptions (R. 132), the true employment situation that existed was one in which all claimants and all other old employees seeking employment after July 5, 1935, would have been rehired had the respondents acted lawfully (R. 222, 225-226); and, further, (4) that—

*** in the fulfillment of the statutory purpose to make whole each employee who had suffered wage deprivation in consequence of the Companies' said unfair labor practices, the Companies properly should have been required to reimburse fully each such employee. However, the Board's remedy, as applied to the actual situation now dis-

covered, requires the Companies to make good to each only a fractional portion of his loss. Hence, as a direct consequence of and in reliance upon the Companies' representation and contention, the Board had been moved to enforce, a remedy which, under the actual facts now appearing, is grossly inequitable to those who had suffered deprivation of earnings in consequence of the Companies' unfair labor practices. (R. 226-227.)

The Board concluded that the lump sum remedy "however interpreted," would substantially shift the loss of wages resulting from the respondents' discrimination to the claimants. The Board further alleged that the back pay remedy as it now stands would relieve the respondents of a major part of their obligation "measured by the actual facts," and "thereby frustrating the purposes of the Act, impairing the remedial operation of the administrative judicial process created thereby and injuring the important public rights intended to be safeguarded" (R. 228). The Board therefore requested that paragraphs 2 (d) and 3 (b) of the decree (R. 210, 212) awarding back pay under the formula be vacated and that part of the case remanded to permit the Board "for the first time" to consider the "actual facts in order to prescribe a remedy appropriate to the true conditions" (R. 229).

The Board estimated that the full wages lost by the claimants, after deducting net earnings elsewhere, would amount to about \$800,000, or roughly \$3,830, on the average, for each claimant for the entire 6-year period of discrimination (R. 227, 302-303, 339).

On August 9, 1943, 6 months after the Board had requested permission to file its petition for remand, the court granted the Board leave to file its petition stating that it would treat the petition "in the nature of a bill of review" (R. 281).

The respondents' answer to the Board's petition, (R. 283-290), although challenging its sufficiency, admitted the

truth of the following crucial fact, to-wit: that they had jobs on and after July 5, 1935, for all 209 claimants plus all other old employees available (R. 288, 295, 301, 305-306). The respondents' admission of this fact caused the Board to move for judgment on the pleadings and the record on the ground that no genuine issue of fact was now in dispute (R. 293-304, 308).

On April 19, 1944, the court below rendered its decision (141 F.(2d) 843), denying the Board's motion for judgment and dismissing its petition to remand (R. 307-311, 312). On May 4, 1944, the Board filed its petition for rehearing (R. 313-324).

On May 11, 1944, the petitioners filed their motion for modification or remand of the back pay provisions of the Board's order enforced by the decree relating to the 209 claimants (R. 329-342). The motion was predicated upon the following grounds: (1) that the Board had made a mistake in setting up its lump-sum formula by leaving out of the footnote 185 an essential element (R. 341, 334-336), pointed out above (*supra*, pp. 12-13); (2) that the employment situation following the close of the hearing on April 29, 1938, had turned out to be otherwise than as prognosticated or assumed by the Board (R. 340); and (3) that the Board's discovery of the true employment situation outlined above, disclosed a factual situation for which the Board had made no provision (R. 337).

On May 17, 1944, the court below granted petitioners leave to file their motion to remand (R. 326). On the

* In its motion for judgment, the Board averred:

"Furthermore, in the brief which they [the respondents] have incorporated in their answer (A. III (13)), they confirmed the admission, which they made in open court on February 27, 1943, in response to an inquiry from Judge Woodrough, that during the discrimination period they were in a position to accord full employment to all claimants and all reapplicants (Co. Br. 4-5, 26, 27, 33, 34, 40, 49, 59), and even declared (contrary to what the record shows) that they *fully conceded* this circumstance upon the original Board hearing (Co. Br. 5-6, 39, 40, 50)" (R. 301).

same day, the court denied petitioners' motion to remand and the Board's petition for rehearing, both without opinion (R. 343).

The Decision of the Court Below

The court below treated the Board's petition to remand as "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence" the unexecuted back-pay provisions of the decree enforcing the Board's order (R. 307). It affirmed its "jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted" (R. 311). From this it follows that in principle the court below recognized the right to modification of a Board order that has been affirmed in a decree. However, the court stated that it was "not persuaded that the Board departed from the form of order by which 'it ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay' in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as the composition of the staff of workmen" (R. 309). It declared that there were "other difficulties" than job insufficiency which caused the Board to depart from its usual back pay remedy and to devise a lump-sum formula (R. 310). It stated that the formula "covers the events of a larger or smaller role of workmen" (R. 309), and that "it is apparent on the face of it that it does not accord to each individual workman in the group an amount of back pay

* The court's opinion reads:

"The Board's formula makes provision for the computations concerning back pay for the group of 209 men in the case that the number of persons newly employed or reinstated after July 5, 1935, is less than, as well as in the case that it exceeds the number who are to be compensated under the order, and so it covers the events of a larger or smaller role of workmen" (R. 309-310).

equal to a full wage from July 5, 1935, to the date of offer of reinstatement, and that it specifically provides a fraction only of such full wage" (R. 310). It therefore concluded that the back-pay provisions of the decree were not "obtained by misrepresentation or wrongful conduct of the Companies" (R. 310). The court further stated that it was not convinced "that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 311).

The court's decision, in its effects, forecloses all further administrative action with respect to the back pay remedy. The Board is left to apply a remedy which it has declared will not effectuate the policies of the Act (R. 228, 229). The 209 claimants have not received any reimbursement of their lost wages, and the back pay provisions remain unexecuted (R. 339-340, 311).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that it was "not convinced that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved," and thus assuming original authority to determine what remedy will bring about fair administration of the Act.

2. In refusing to remand the back pay provisions of the decree and thereby assuming original jurisdiction over the fixing of the specific amounts of wages lost and back pay to be awarded.

3. In refusing to permit modification or remand of the back pay provisions for the discrimination period follow-

ing the close of the hearing before the trial examiner so as to accord with the Board's intent as expressed in its order.

4. In refusing to permit the Board to correct its mistake in formulating footnote 185.

5. In holding that the Board departed from its normal remedy for reasons other than its understanding as to the employment situation.

6. In holding that the Board intended to award partial back pay where full wages were lost by the entire group of claimants.

7. In holding that paragraphs 2 (d) and 3 (b) of the decree should not be modified, or vacated and remanded.

SUMMARY OF THE ARGUMENT

The decision of the court below stands as a barrier against the Board completing its administrative functions. The authority of the Board does not end with the entry of an enforcing decree, because the continuing nature of the administrative process necessitates the Board's continuing supervision over the remedy prescribed to achieve the Congressional policies. Particularly where, as here, the order for back pay is general, the Board must fix the back pay at some stage of the proceeding as an original tribunal and not as the surrogate of the court, and the order enforced by the decree must be freed of ambiguities and mistakes before contempt proceedings are brought.

In dealing with unfair labor practices under the National Labor Relations Act the courts are limited to specific functions, which do not include the choosing or fashioning of remedies before enforcement, nor the determination whether after enforcement the relief prescribed will achieve the results intended. Only the Board is the proper tribunal to make such a determination. This is a

principle basic to the administrative process, as the Circuit Court of Appeals for the Fourth Circuit held in *American Chain & Cable Company v. Federal Trade Commission*, 142 F. (2d) 909. "To hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement." Nor is there danger that the decree of the court may be flouted by a modification undertaken by the administrative agency, because any such modification would then be subject to review by the court. An advantage of this ruling is that the modified order comes to the court after full investigation and hearing and after the agency has exercised its administrative competence. In addition, to permit the issue to be litigated on a motion to remand entails unnecessary delays. It places the court in a position where it has to determine matters administrative in character at a time when the evidence is incomplete and the Board has not yet determined the relief suitable to the changed conditions.

The factors governing revision of administrative orders are not those controlling the reopening of common law judgments and equity decrees. The decision below laminates onto the flexible administrative process a rigid bill of review procedure involving issues wholly extrinsic to the Act, and assumes that administrative competence somehow fails to survive a term of court. The relevant consideration for revision of a Board order enforced by a decree is effectuation of the policies of the Act. No more after enforcement than before should courts substitute their judgment for that of the Board as to the efficacy of a particular remedy, and thus prevent the exercise of the Board's expert judgment at precisely the point where it should command the greatest deference.

The circumstances of the instant case warrant administrative reconsideration of the back pay remedy. The as-

sumptions upon which the Board predicated its special lump-sum formula were false. Besides, the formula contains a mistake in its formulation, which, as admitted by the Solicitor General on behalf of the Board, defeats the Board's expressed intent. Furthermore, the court below improperly construed the Board's order as well as its own prior decision enforcing it. The court's reinterpretation of the Board's remedy results in a retrospective reversal of the relationship between court and agency. Finally, the court failed to consider other relevant factors in the case. It disregarded the fact that the claimants are required to give up 75 percent to 99 percent of the wages they lost on account of respondents' unfair labor practices, contrary to the expressed intent of the Board to "make whole" the claimants for such losses, an untenable result, particularly in view of the background of the case and of the peculiar situation which developed after nine years of delay in attaining the objectives of the Act.

Irrespective of any other consideration, the remedy became inapplicable by reason of changed circumstances for the period of discrimination following the close of the hearing before the trial examiner. Here the remedy was prospective in character and based upon hypothesis and assumption instead of proven fact. Such a continuing or prospective back pay remedy is subject to revision when subsequent developments reveal that it fails to achieve the results intended by the Board.

ARGUMENT

I.

THE COURT BELOW ERRED IN FORECLOSING THE NATIONAL LABOR RELATIONS BOARD FROM TAKING FURTHER ADMINISTRATIVE ACTION WITH REGARD TO UNEXECUTED BACK PAY PROVISIONS OF THE DECREE.

In October, 1939, the National Labor Relations Board entered a decision which unequivocally found the respondents guilty of unfair labor practices, and, in addition to other relief not here material, ordered them to make the 209 claimants whole for wage losses suffered on account of these unfair labor practices. In June, 1941, the court below affirmed and enforced this order. The present proceeding concerns the procedures to be followed in executing this order. It arises from the fact ascertained by the Board during compliance investigations that the remedy does not achieve the results intended (R. 228).

The Board, instead of acting on its own authority and making the necessary corrections and adjustments, which are a part of its administrative functions, applied to the court below for permission to do so. The court, instead of holding that the Board had authority to take further administrative action without first obtaining its permission, in its turn, treated the Board's request as one in the nature of a bill of review, and applying common law or equity standards, held that it was "not convinced upon the showing in these proceedings that * * * perversion of justice or unfair administration of the Act had been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 310-311).

The decision of the court below stands as an injunction against the Board taking further administrative action necessary to effectuate the policies of the Act. Thus the court below and the Board together have contrived to

erect a barrier in the way of disposition of this case. What to petitioners seems to be essentially a simple situation has become an involved question of law. Solution of the controversy depends, we believe, upon the answers to the following questions:

1. Which is the proper tribunal to decide whether further administrative action is necessary?
2. What are the relevant considerations?
3. What are the merits of the case?

No explicit answers can be found in the National Labor Relations Act or in the decisions of this Court. It will be necessary, therefore, broadly to consider the issues involved.

A. The Board is the Proper Tribunal to Decide Whether After Enforcement Further Administrative Action is Necessary.

1. The authority of the Board does not terminate with the entry of a judicial decree.

Several provisions of the National Labor Relations Act charge the Board with functions which continue after entry of a decree enforcing its order. Section 10 (c), which authorizes the Board to enter an order granting relief, specifies that "such order may further require such person to make reports from time to time showing the extent to which it has complied with the order", thus explicitly providing for post-decree action by the Board. Other provisions of the Act implicitly recognize the Board's authority to function after entry of an enforcing decree. For example, under Section 5 "The Board may prosecute any inquiry necessary to its functions in any part of the United States". Both the powers of the Board concerning representation of employees and elections under Section 9 and concerning prevention of unfair labor practices under Section 10 are unlimited in time. The powers of the

Board conferred in Section 11 to conduct such investigations and hearings which, "in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10", are not restricted to any particular stage of the proceedings.

A consideration of the deeper issues involved supports this reading of the Act. The administrative process is not merely a new method of dealing with old problems. Industrial development has forced upon us the need for "government to maintain a continuing concern with and control over the economic forces which affect the life of the community".¹¹ Government now takes active steps to control human relations and to manage the material resources of the nation. It no longer simply umpires private controversies.

These undertakings of government are characterized by a trend towards preventive legislation which increasingly supplants action designed merely to correct evils after they have occurred.¹² Administrative action looks to the future. It is particularly relevant to stress this distinguishing characteristic in the case of administrative adjudications. On its face a back pay order of the National Labor Relations Board looks much like a common law judgment for money damages. But a common law judgment is limited in its scope to the interests of private liti-

¹¹ Landis, *The Administrative Process* (1938), p. 8. Cf. S. Rep. No. 8, 77th Congress, 1st Session, Chapt. 1, Attorney General's Report on Administrative Procedure in Government Agencies.

¹² Cf. *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 194; *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533; *National Licorice Company v. National Labor Relations Board*, 309 U. S. 350, 364-365; *Waterman Steamship Co. v. National Labor Relations Board*, 309 U. S. 206; *Corning Glass Works v. National Labor Relations Board*, 129 F. (2d) 967, (C.C.A. 2); *National Labor Relations Board v. Waumbec Mills, Inc.*, 114 F. (2d) 226, (C.C.A. 1); *National Labor Relations Board v. Killoren*, 122 F. (2d) 609, (C.C.A. 8), cert. den. 314 U. S. 696.

gants and it merely corrects the consequences of their past conduct. The granting of back pay, however, creates no private rights and the parties are incidental only. The remedy, rather, is a means of achieving a larger objective—industrial peace. It is designed primarily for its effect upon the future; it seeks to create in employees the confidence that the exercise of their right to self-organization, declared important as a matter of public policy, will be effectively protected (Section 1, 7 and 8 of the Act).

The continuing nature of the administrative process is reflected in the practice and experience of the National Labor Relations Board. Since industrial relations are not static, but are dynamic and changing, they require continuing supervision. Adequate handling of the problems necessitates flexible and expeditious action foreign to the judicial process. While judicial procedure traditionally leaves enforcement to private initiative, the Board must maintain a special compliance division. In this sphere many novel problems arise with which the Board must deal on its own initiative if the objectives of the Act are to be achieved. Laborious investigations by the Board's staff¹¹ and by its regional offices often begin only after their objectives have been defined in an enforced order. In these post-decree procedures the Board's technical knowledge and familiarity with the subject matter comes into full play. It is then that the practical consequences of an order and decree, often worded in general terms, are evaluated.

Other technical considerations and difficulties are often involved in making record and payroll analyses for the

¹¹ The Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, *supra*, page 18, states: "The size of these staffs reflects both the nation-wide jurisdiction of the agencies and the character of the work they are called upon to perform. Each is charged by Congress with the work of *continuing supervision* of some field of activity throughout" (Italics ours).

purpose of reinstatement and the computation of the back pay due." The Board in its petition to remand in the instant case noted that after entry of the decree numerous members of its staff had been employed for several months in checking respondents' audit and back pay computations involving thousands of employees for a six-year period (R. 225). Part of this work is reflected in the tables contained in the Appendix filed by the Board as a part of its motion to remand (R. 268-280). In the post-decree work of fixing the specific back pay due, many terms of the enforced order require expert interpretation and application, for instance, the ascertainment of "net interim earnings". In addition to the usual problems, the formula in the case at bar creates further difficulties. How shall the "average earnings of a new or reinstated employee" (R. 133, n. 185) be computed? Shall the earnings of new or reinstated employees who worked but one day a week, or on some other part-time basis, be included in a daily, weekly, monthly, annual or six-year average? Shall there be one governing proportion (R. 134) computed on the basis of the actual number of claimants and reapplicants over the whole six-year period or by the number of claimants and reapplicants from day to day, week to week, or on some other basis? Shall there be a separate governing proportion for each day, week or month, computed on the basis of the actual number of reapplicants rather than of the average number? Does the governing proportion change when a reapplicant leaves his job? The

"Illustrative of the difficulties involved, the Board in its *Fifth Annual Report* (Gov't Printing Office, 1940), pp. 128-129, refers to the *Stackpole Carbon Company* case, 105 F. (2d) 167, cert. den. 308 U. S. 605, where a fluctuating employment situation existed, and the *Carlisle Lumber Company* case, 99 F. (2d) 533, where a deferred payment plan was devised because of inability of the company to meet the back pay order.

determination of such questions, it is clear, "belongs to the usual administrative routine of the Board".¹⁸

The Circuit Courts of Appeals for the Second, Fifth and Sixth Circuits have ruled that the Board itself should determine the specific amounts due under a general back pay order which, like that in the instant case, does not fix the back pay due. Such orders were held to be "interlocutory" only.¹⁹ The court below, by preventing the Board from taking further action, thereby necessarily precluded the Board from independently fixing the specific amounts of back pay to be awarded. In this respect the court below assumed original jurisdiction. But the fixing of the specific amounts of back pay is a post-decree function which the Board alone has the facilities and expertness to undertake.

"At some stage of the proceeding", said Judge Learned Hand in the *New York Merchandise Company* case, "the Board must therefore fix it [the back pay] as an original tribunal and not as the surrogate of the court", or else confusion will arise with "consequences which we think have not been fully realized" (p. 951). Some of the consequences of substituting judicial for administrative post-decree action were envisioned by Judge Clark of the Circuit Court of Appeals for the Second Circuit when he observed: "Experience, I think, now shows that there is serious question as to the wisdom of committing the last and perhaps most delicate step of labor law enforcement—proceedings in contempt—to somewhat alien professional interests as in effect a court of first instance. * * * We lose the very quality of expertness and exercise of wise dis-

¹⁸ National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 130.

¹⁹ N.L.R.B. v. New York Merchandise Co., 134 F. (2d) 949, 952 (C.C.A. 2); Agwifines, Inc., v. N.L.R.B., 87 F. (2d) 146, 150 (C.C.A. 5); N.L.R.B. v. Newberry Lumber and Chem. Co., 123 F. (2d) 831, 839 (C.C.A. 6).

creation in difficult and troubled situations which is the essential basis for committal of such matters to agency control. * * * Moreover, the long wait while the new tribunal is familiarizing itself with the law and the facts—here delaying settlement of an active labor dispute for a year after seeming agreement, though the underlying facts were substantially undisputed—underlines perhaps the chief problem of administrative procedure, that of delay in effective action. I suggest that the taking of testimony for our consideration on these proceedings should be had promptly through the trained examining staff of the Board itself; * * *.” *National Labor Relations Board v. Gian-nasca*, 119 F.(2d) 756, 759.”

A further difficulty was noted by Judge Hand in the *New York Merchandise Company* case, when he stated that “until such hearing has been had and a decision rendered fixing the amount [of the back pay], the employer cannot be guilty of contempt, because it is cardinal in that subject that no one shall be punished for disobedience of an order which does not definitely prescribe what he is to do” (p. 952).”

In order that a labor board proceeding be completed, it is imperative that the Board retain authority to exercise its administrative competence and judgment in fixing the specific amounts of back pay due. Nor is a contempt proceeding the appropriate place to determine other matters just as basic to the nature and scope of the decree as the specific amounts of back pay due. Such matters as the meaning of the Board's order, its assumptions and theory, are improperly deferred to the contempt stage of the pro-

” Cf. *Corning Glass Works v. National Labor Relations Board*, supra, pp. 971-973; *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. (2d) 919, 937 (C.C.A. 2).

” In the *Phelps Dodge Corporation* case, supra, p. 200, it was remarked that back pay matters “should not be left for final settlement in contempt proceedings.”

ceeding for clarification. To hold otherwise would be not only to sacrifice the administrative competence of the Board in an area in which it speaks with authority, but also to impose upon the courts the serious handicaps of resolving essentially administrative issues in an environment alien to their effective handling, and upon employers the burden of contempt when a decree has not been freed of ambiguities.

2. In dealing with unfair labor practices under the National Labor Relations Act the courts are limited to specific functions.

Congress has entrusted the courts with an important role in the administrative process. For reasons based in tradition, it has often refused to grant administrative agencies the power to enforce their rulings by sanctions issued under their own authority." The Board, for example, must rely upon the Circuit Courts of Appeals for enforcement of its orders. Section 10 (c). Here, the courts assume a new function; one which "is only a phase of a single-unified process". In addition, the courts serve as "a check on the administrative branch of government—a check against excess of power and abusive exercise of power in derogation of private rights". But, the courts exhaust their *limiting* authority when they ascertain that the administrative agency has stayed within the boundaries of its allotted domain, has fulfilled the constitutional require-

* Cf. Landis, *supra*, Chapter III.

* Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 141. Cf. United States v. Morgan, et al, 307 U. S. 183, 189.

* Cf. S. Rep. No. 573, 74th Congress, 1st Session, p. 15; H. Rep. No. 1147, 74th Congress, 1st Session, pp. 23-24; National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318, 342.

* The expression "limited review", coined in the Phelps Dodge Corporation case, characterizes the scope of the court's function (313 U. S. at p. 194). From a functional point of view, it is a "limiting review". The restraint characterized in the one expression is upon the courts; in the other, upon the administrative agency.

ments of procedure, and has lived up to minimum standards of fairness." In exercising this authority courts must guard against usurping functions administrative in character. The principles which guide the judiciary in their action as part of the unified process are summarized by the phrase "judicial restraint".*

The fashioning of remedies is peculiarly a matter of administrative competence, for it is to the administrative agencies alone that Congress has entrusted the determination of matters of policy." Even when the Board transgresses its domain, the court has no authority to fashion and substitute a remedy it deems appropriate. The court can only refuse to enforce or remand. At no time does the administrative power to fashion a remedy pass to the court, not even when the remedy is embodied in a court decree. Nor does a decree entered by a court have a continuing effect so as to narrow further administrative action. This was held in the case of *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134. There the Commission denied an application by the company for a permit to construct a broadcasting station. On appeal the decision was reversed and the case remanded to the Commission because the Commission had applied an erroneous rule of law. In the proceedings after remand, the Commission considered circumstances which arose after the original hearing, namely, the applications of other companies for the permit. The company sought to foreclose consideration of these new factors by petitioning for a writ of mandamus. The Circuit Court of Ap-

* Cf. *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Labor Relations Board v. Falk Corporation*, 308 U. S. 453, 461; *International Ass'n of Machinists, etc., v. National Labor Relations Board*, 311 U. S. 72, 82.

"S. Rep. No. 8, 77th Congress, 1st Session, p. 90; Levin, *Mr. Justice William Johnson and the Unenviable Dilemma*, 42 Mich. L. Rev. (1944):803.

* *Phelps Dodge Corporation*, supra, p. 194.

peals granted the writ. This Court reversed the decision and held that after remand "the Commission was again charged with the duty of judging the application in the light of 'public convenience, interest or necessity'" and that "all matters of administrative discretion remain open for determination on remand after reversal" (p. 146)."

Courts and administrative agencies both are vital forces in the armory of government. The common aim set for both is attainable only by cooperative effort. Both have every reason to increase confidence in the administration of justice jointly entrusted to them. Courts should hesitate to undermine this confidence by an *a priori* distrust of the Board, or to formulate rules based on such *a priori* distrust—a practice engaged in by many critics who, under the guise of comment on the methods and procedures of administrative agencies, hide their hostility to the policies which these agencies have been appointed to further."

3. *The National Labor Relations Board is the proper tribunal to decide whether an order embodied in a decree will adequately effectuate the policies of the Act.*

All practical considerations which have led Congress to entrust fact-finding and policy to the Board are present equally after enforcement as before. The court does not acquire, simply by enforcing an order, the special experience and familiarity with the problems which the Board possesses. The laborious and technical investigations necessary before it can be determined that the decree will not effectuate the policies of the Act can be performed only by the Board. Since all matters of relief are closely related to the question of policy, they are administrative in character and belong to the Board.

These principles were recognized by the Circuit Court of Appeals for the Fourth Circuit in its decision in *Ameri-*

* Cf. *El Moro Cigar Co. v. Federal Trade Commission*, 107 F. (2d) 429, 432 (C.C.A. 4).

* Gellhorn, *Administrative Law: Cases and Comments* (1940), p. 5.

can Chain and Cable Company, Inc., v. Federal Trade Commission, 142 F.(2d) 909, decided May 29, 1944. In that case the company, on account of the war, applied for a stay of enforcement of a cease and desist order of the Federal Trade Commission which had been affirmed by the court (139 F.(2d) 622). In an opinion by Judge Parker, the court held that it had no power to stay or modify its decree because the Commission had not first modified its order "since the decree is based on the order, not on the conditions which called it forth", and it added, "To hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement" (p. 913).

This analysis of the judicial function in the administrative process is consistent also with Section 10 (a) and (c) of the National Labor Relations Act which vests in the Board "exclusive" power to prevent unfair labor practices and to remedy their effects. It also recognizes an appropriate sphere for judicial review. As Judge Parker observed, "there is no danger that the decree of the court may be flouted by such modification", for "any action taken by the Commission would then be subject to review by the court, as in the case of other orders * * *" (pp. 912-913). "When the rewritten order comes before the court after full investigation and hearing, and with a complete record, the court is then in a position to determine all matters within its competence clearly and expeditiously.

Nor can it be the meaning of this Court's decision in *Ford Motor Company v. National Labor Relations Board*,

* As the Board in its memorandum in support of the petition for certiorari points out, Section 5 (b) of the Federal Trade Commission Act, 38 Stat. 717, as amended (15 U.S.C. 45 (b)), which the Fourth Circuit Court of Appeals construed in making its decision, served as a model for Section 10 (d) of the National Labor Relations Act (Bd's Mem., p. 16 and note 5).

305 U. S. 364, that courts are vested with such administrative functions. While this case holds that the Board does not have an absolute right to reconsider its order while its enforcement proceeding is pending before the Circuit Court of Appeals, that decision is not a denial of a special competence of the administrative agency to deal with its remedial orders. For purposes of orderly procedure it was necessary to rule in the *Ford* case that the court be allowed to dispose of the case before it without the intrusion, at the same time, of another tribunal. *American Chain and Cable Company v. Federal Trade Commission*, supra, p. 912. The *Ford* ruling does not foreclose modification or further administrative action after the court's functions have been completed. The reason is stated in the *American Chain and Cable Company* case, "The necessity for modification may be just as urgent in the case of an order which has been affirmed and ordered enforced by the Circuit Court of Appeals * * *" (p. 911). Judge Parker further observed, "* * * after a Circuit Court of Appeals has acted upon a petition for review, there is no reason why the Commission should not modify its order, if modification is warranted by the changed conditions contemplated by the statute" (p. 912). See, Board's Memorandum, p. 20.

The reasoning of Judge Parker is applicable in the case at bar. The Board is vitally concerned with the execution of the measures it has prescribed in order that it may ascertain whether the effects intended are or can be achieved. This implies the duty on the part of the Board to make corrections or adopt different measures when it appears that the original remedy has failed of its purpose; otherwise, this function of the Board is reduced to a useless ritual. The power to prescribe and supervise remedies carries with it the authority to correct and revise them.

In the *American Chain and Cable Company* case it was held not only that the administrative agency has power to

modify an order which has been affirmed by the court, but also, that it need not first obtain permission of the court to do so. These conclusions are consonant with the scheme of the National Labor Relations Act. If the court's function in a proceeding to remand an order which has been affirmed by the court is not to be a purely formal one, then the only other alternative would be one which places upon the court the duty to appraise the facts not at that time fully investigated and to make a determination of policy upon such tentative investigation." These matters are best left to the agency, which has kept in constant touch with the case, until it has completed its investigations and has arrived at definite findings and conclusions after a hearing, which then could be presented to the court for review. A court should no more properly prevent the Board from determining that an order affirmed by a court should be reconsidered than it can preclude the Board from issuing a complaint. The reason is the same in both cases, namely, the court would be required to exercise functions which are administrative in character.

If the Circuit Court of Appeals for the Fourth Circuit is correct in its views of the administrative process, as it has expressed them in *El Moro Cigar Company* case and in the *American Chain & Cable Company* case, then, it is submitted, the Board was ill-advised in petitioning the court below to vacate the unexecuted back pay provisions of the decree and to remand so much of the case as was affected thereby (R. 229). The court, in turn, should sim-

* Remand proceedings involve considerable delay. In the present case the Board petitioned the court to vacate and remand on February 4, 1943 (R. 215-230). Not until August 9, 1943, did the court permit the Board to file its petition, and after extensive litigation the court denied the Board's petition on April 19, 1944 (R. 312). Even had the court below granted the Board's petition to remand, over 14 months would have been wasted in unproductive litigation before the Board's authority to take further administrative action would have been established, and the actual work begun.

ply have pointed out that the Board needed no special permission from the court to proceed with its administrative functions. Instead, the court held that it was "not convinced upon the showing in these proceedings that . . . perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 310-311). In so doing the court assumed authority to determine a question of policy contrary to the Board's conclusion, namely, that a particular remedy would effectuate the policies of the Act. Thus the court, summarily appraising the situation, formally held that there was no occasion for further Board action.

Clearly the petitioners were seriously aggrieved by this barrier to final disposition of the case. However, when petitioners presented their motion to remand to the court, it was dismissed without opinion on the very day the court allowed it to be filed. Only a reversal by this Court can now lead the way out of the stalemate.

B. What Factors Govern Determination Whether a Board Order Embodied in a Decree Should Be Reconsidered?

1. The factors are not those governing revision of common law or equity decrees.

The court below assumed that further administrative action was unwarranted unless the decree contained such defects as would warrant reopening by a chancellor of a judgment entered in an equity or common law proceeding. Thus, the court treated the Board's petition to remand as one "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2 (d) and 3 (b) of the final decree of this Court" (R. 307), and purported to test the Board's petition by equity principles.

But those principles are wholly irrelevant here.* Reluctance to reopen equity decrees and common law judgments stemmed from a desire for the certainty and finality necessary for orderly transactions in the commercial world, and an unwillingness to disturb rights which had been acquired in reliance upon the judgment of the court. But it is a commonplace that the Act does not adjudicate private rights and that labor relations are highly fluid and not put to rest for all time by a single decision. Moreover, it can hardly be said that a decision, as here, which leaves workers with a continuing sense of frustration and awareness of the improvidence of self-organization settles anything.

The decision below laminates onto the flexible administrative-judicial system, designed by Congress as the exclusive means of applying and enforcing the Act, a rigid bill of review procedure involving issues wholly extrinsic to the Act. More importantly, the decision assumes that administrative competence somehow fails to survive a term of court. And, finally, although contempt proceedings may be a future possibility the decision denies the Board the opportunity of identifying and clarifying the issues upon which such a proceeding must rest. The petitioners' concern with these considerations is neither formal nor abstract, for unless the Board is given an opportunity to bring its administrative competence to compliance problems the assurances of organizational freedom which they receive from courts may well prove barren.

2. Relevant considerations.

There is no aspect of the entire administrative process which so directly and plainly reflects and expresses overall

* Compare, *National Labor Relations Board v. Hearst Publications, Inc.*, 309 U. S. 111; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 362, 364; *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 539.

administrative policy as the area of remedy. As this Court has frequently observed, remedial functions have been entrusted exclusively by Congress to the Board. It is through its remedies that the agency most directly expresses its expert character, its experience with the special class of problems entrusted to its care. For a court, therefore, to substitute its judgment for that of the administrative agency as to the efficacy of a particular remedy is to deny the expert qualities of administrative functioning at precisely the point where it should command the greatest deference. Nor does the entry of a decree render it improper to entrust the alteration of remedies to the judgment and discretion of the administrative agency within the same limits as the statute has empowered it with the original fashioning of remedies. *American Chain & Cable Company, supra.*

While the Board in its petition to remand recited that it had invoked the lump-sum formula solely because it had presumed on the basis of evidence introduced and representations made by the Companies, that at all times after July 5, 1935, there were less jobs open than old employees available (R. 221), the court held that it was "not persuaded that the Board departed from the form of order by which it 'ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay' in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as to composition of the staff of workmen", (R. 309). Contrary to the clear import of the Board's decision (R. 132-134), its petition to remand (R. 221), its motion for judgment (R. 294), and the court's decision on review and enforcement (R. 203), the court held that there were "other difficulties" than job insufficiency which

caused the Board to depart from its ordinary back pay remedy and to devise its lump-sum formula (R. 310). Significantly, the court failed to indicate what these "other difficulties" might be. No "other difficulties" are mentioned in the Board's decision, and none appear in the entire record. The court could have arrived at this conclusion only by substituting its own appraisal of the old evidence for that of the Board."

While the Board stated that the back pay remedy, "however interpreted, would substantially shift the loss resulting from the Companies' unfair labor practices to the employees discriminated against, and relieve the Companies of a major part of their obligation, measured by the actual facts, thereby frustrating the purposes of the Act" (R. 228), the court held that the remedy would not bring about "unfair administration of the Act" (R. 310). The court persisted in its view notwithstanding that petitioners specifically called its attention to the fatal distortion of the remedy brought about by the mistake in footnote 185 (R. 334-336). The court thus undertook to decide matters of administrative policy without regard to the practical consequences which the remedy produced. In fact, many relevant circumstances of the case which the Board would consider were not even presented to the court below.

Nor can it be expected that the court can acquire a view of the delicate issues involved here in a proceeding based on affidavits alone. It manifestly requires a conscientious and careful investigation and the use of accounting and investigatory procedures not at the disposal of the court.

* While the Board averred that the respondents had practiced "conscious misrepresentation" concerning the true employment situation (Board's Mem., p. 24; R. 216, 298), and that it had adopted the special lump-sum formula only to accommodate the back pay remedy to the Companies' evidence and representations, the court below held that the back pay provisions of the decree were not obtained by misrepresentation or wrongful conduct of the respondents (R. 310).

C. The Circumstances of the Instant Case Warrant Administrative Reconsideration of the Back Pay Remedy.

The case at bar furnishes an apt illustration of the difficulties inherent in the task of "dissipating the continuing effects of prior unfair labor practices", and of the consequences arising if the Board is not given an opportunity to complete its administrative duties.

1. Assumptions of the Board upon which it predicated its special lump-sum formula were false.

As discussed above, it is the effects of the Board's order that must be considered. The stated objective was, in consonance with the Act and the Board's established practice, to remedy, as far as possible, the economic ill-effects of the respondents' unfair labor practices, and to "restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (R. 132). During the compliance phase of the case the Board was faced with the undeniable fact that this result had not been achieved, and, so it seems, could not be achieved under the order. Assumptions of the Board, which were the basis of the special lump-sum formula, were false (*supra*, pp. 15-17).

2. Footnote 185 of the formula contains a mistake in its formulation defeating the Board's expressed intent.

Furthermore, the back pay order was found to contain a mistake in the formulation of footnote 185 (R. 334-336).

The Solicitor General in his memorandum points out that the mistake was "entirely harmless in the employment situation then understood to exist by the Board" (Bd.'s Mem., p. 10). However, under the circumstances subsequently disclosed, this mistake reduced the back pay to but a small fraction of the sum intended. Nothing could be clearer than the language used by the Solicitor General (Bd.'s Mem., p. 11):

The Board admits that the formula contains the mistake which the Unions set forth in their petition and further admits that such mistake renders the formula wholly inaccurate as a measure for back pay.

Instead of restoring the status quo, by reimbursing the claimants to the full extent of their wage losses, the formula reimburses them for less than 1 percent of such losses, according to the respondents' interpretation (R. 225), or approximately 25 percent of such losses according to the Board's rough calculations (Bd's Mem. in support of certiorari, pp. 10-12, n. 2).^{*} Thus, even if we were to consider, in the language of the court, what "is apparent on the face of the formula" some form of administrative therapy would nevertheless be required to make the formula speak the truth.

3. *The court below improperly construed the Board's order and its own prior decision enforcing it.*

The court's opinion reads: " * * * although it is apparent on the face of it [the lump-sum formula] that it does not accord to each individual workman in the group an amount of back pay equal to a full wage from July 5, 1935, to the date of offer of reinstatement, and that it specifically provides a fraction only of such full wage, we held that the Board was within its rights in requiring payment of the fraction of such wage prescribed in the formula" (R. 310). But, the opinion of the court on review and enforcement of the Board's order indicates that, on the contrary, the court then assumed, as did the Board, that, because of curtailed employment, the sum to be apportioned under the formula was the full wages lost by as many of the group as would have earned wages had the respondents acted lawfully, and not that apportionment of the lump

^{*} This estimate is made without regard to possible additional reductions resulting from other infirmities in the formula (Bd's Mem., pp. 12-13, n. 3; 23, n. 7).

sum would compensate them for a mere fraction of the wages lost (R. 203, 207; 119 F.(2d) at pages 914-915). The court as well as the Board, assuming job insufficiency, stated that the formula seeks to "make whole" the group for *all* wages lost by them (R. 169, 171, 210, 212). The Board expressly stated that its formula seeks "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (R. 132).

When this section of the opinion is read in conjunction with the court's pronouncement that factors other than uncertainty as to the employment situation were responsible for the remedy as adopted, it seems clear that the court has attributed to the Board an intention to reduce the back pay award because of doubts as to the merits of the case. This is not only utterly unfounded but attributes to the Board a wholly novel remedial principle. It is manifest that it is the province of the Board and not the court to explain the rationale of its orders and their meaning. The court's usurpation of this function here gravely disfigures the entire back pay theory of the Board in this case. As a general matter, a "reinterpretation" by a court of an administrative remedy after the term has passed can well result in a retrospective reversal of the relationship between court and agency.

4. The court failed to consider other relevant factors.

The respondents' tender of the sum of \$8,500, and later \$5,400, in purported full payment of all wages lost by the claimants was notice to all employees that the statutory promise of immunity was not to be fulfilled, and that, in effect, the efforts of government on their behalf were defeated." A final determination depriving the claimants

² Cf. National Labor Relations Board v. Hopwood Retinning Company, Inc., 104 F. (2d) 302 (C.C.A. 2); where the company offered \$1,500 in full settlement of the back pay, although a sum in excess of \$200,000 was "asserted to be due". The insufficiency of this offer was considered when the company was held in contempt.

of 75 percent to 99 percent of the restitution of wages they lost on account of respondents' unfair labor practices is tantamount to a severe penalty for their lawful collective action. It releases the respondents from their statutory liability at the price of a small fraction of the losses they have caused. But it may not be assumed that what is complained of here is merely that respondents have bought violation of the Act for too cheap a price.

The whole background of the case, the peculiarities of its locale also are factors to be considered. To appreciate the case in its right perspective, the character of the mining community in the Tri-State area of Missouri, Kansas and Oklahoma must be before the eye of the court, if it is to judge at all. In the words of John Campbell, personnel manager of the respondents (R. 34): "There is not much else in this community on which the working man can live except the mines, and that is practically the support of other industry and business in the district. And the men had been on reasonably low wages and, in fact, very low wages up to the time of the strike on account of very low market prices for concentrates. And being down, being out of work a week or 2 weeks, brought most of them to destitution" (R. 44). The cellular insulation of a one-industry district, where the respondents hold a dominant position, truly epitomizes the inequality of bargaining power sought to be balanced by the Act (Section 1). In this situation the psychological effects of unlawful company action find increased resonance. The effects of unfair labor practices are abnormally exaggerated and the evils increased by the passage of time, until they become a permanent shackle upon the right of self-organization. All efforts of the union run into an impassable wall of fear sustained by the ever-present example of the victims of the respondents' discrimination. Men refused employment because of union activity by an employer and blacklisted

by concerted employer policy are effectively eliminated from all gainful occupation. Nor can they find succor in the example of more successful unions. Defeat here means destruction. The respondents, in fact, turned the plight of their own victims into a weapon for their fight against the union, constantly referring to it in the paper published by the company-dominated union which was financed by respondents' money."

In this situation the decision of the Board in 1939 and the decree of the court in 1941, far from restoring freedom to the employees, have become instruments of continuing restraint. For respondents shifted their campaign against the petitioners "to the more successful front of extensive judicial review",¹ and in this impassable swamp of procedure the case has been bogged down for nearly six years.

As part of the unified administrative process the court below could not properly have precluded the Board from transforming these various considerations into reality. The Board was fully justified in deciding that reconsideration of its order was necessary to effectuate the policies of the Act.

¹"The following is an example taken from the paper of the Tri-State (Company) Union (R. 55-56):

"The head of this Union, his name is Mike,

He and Joe Nolan were in the lead of the Parade with Pick

Handles when we broke the strike.

Mike said let the yellow bellys stay on relief,

And drink their dried milk and eat canned beef.

Because our little Union is just doing fine,

Let the rest of the strikers stay on the soup line.

Their are losing their cars and selling their hogs,

For the International Union has gone to the Dogs".

²Corning Glass Works v. National Labor Relations Board, 129 F. (2d) 967, 974.

D. Irrespective of Any Other Consideration, the Remedy Became Inapplicable for the Period of Discrimination Following the Close of the Hearing by Reason of Changed Circumstances.

If this Court should hold that the Circuit Courts of Appeals have the power to foreclose the Board from exercising its judgment as to whether the remedy should be modified, then, it is submitted, the court below used this power improperly. The arguments made above would then be utilized at this juncture. Since no useful purpose is served by repetition, we proceed to a consideration of the final issue.

1. The remedy was in greater part prospective in character, and based upon hypothesis and assumption instead of proven fact.

The hearing commenced on December 6, 1937, and ended on April 29, 1938 (R. 27). The findings, conclusions, and order of the Board were entered October 27, 1939 (R. 25). The Board found that the discrimination period began July 5, 1935, and since offers of reinstatement^{*} were made by the Companies on August 23, 1941 (R. 224), after entry of the enforcing decree, the back pay period ends on that date. Therefore, the back pay order in greater part operated prospectively, for a continuing period in the future—after April 29, 1939, to August 23, 1941. "In thus striving to restore the status quo, the Board was forced to use hypothesis and assumption instead of proven fact". *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 663 (C.C.A. 2).

* The Lead Company refused to offer reinstatement to James Curry (R. 224, n. 7), a claimant named in paragraph 2 (c) of the reinstatement and back pay order (R. 168, 172, 176). Either the Company is flouting the order, or else after enforcement some new circumstance has been discovered which the Company believes warrants its refusal to reinstate Curry. If the latter alternative be the case, the Company has put into practice the rule petitioners seek to establish.

The Board had no way of forecasting the employment situation likely to exist after the hearing. It had to rely upon the respondents' evidence and representations during the hearing that the condition of severely curtailed employment was lasting (*supra*, pp. 7-9). As late as December 13, 1938, the respondents asserted, in their argument to the Board in Washington, that "Mines are closing daily" (R. 22). The Board was therefore warranted in assuming, from all that then appeared, that the condition of job insufficiency, which the respondents had shown to exist during the hearing, would continue in the future (R. 132). Consequently, the Board invoked the lump-sum formula as a general method for computing back pay for the period of discrimination subsequent to the hearing (R. 133-134).

2. *A continuing or prospective back pay order is subject to revision when subsequent developments reveal that it fails to achieve the results intended.*

The Board assumed that after the close of the hearing there would continue to be less jobs open than old employees available (R. 132-134). This assumption turned out to be incorrect (R. 225). The remedy prescribed in advance fails to achieve its purpose in the employment situation as it actually developed.

Directly in point is the decision of the Circuit Court of Appeals for the Second Circuit in *Corning Glass Works v. National Labor Relations Board*, 129 F.(2d) 967. In that case the court, after enforcement, remanded the continuing portion of the back pay remedy to the Board for its administrative revision. The court stated (p. 972):

It is true that, in proper circumstances, the continuing nature of a back-pay order may call for adjustment because of new facts which have occurred after the conclusion of the Board's hearing which led to the entry by the Board of such an order.*

* Similar need for adjustment, because of changed circumstances, may arise in connection with an injunction decree

(United States v. Swift & Co., 286 U. S. 106, 114-115) or a decree for alimony (19 C. J. 273 ff).

Recognizing the possibility of changed circumstances, this Court in *Franks Bros. v. National Labor Relations Board*, 321 U. S. 702, 705-706, observed:

For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. * * * the Board may, in proper proceedings and upon a proper showing, take steps in recognition of changed circumstances.

Since a portion of the back pay remedy in question here is based upon assumption instead of proven fact, it could not have been intended to fix permanently the remedial relief of back pay for such period without regard to the actual facts which might develop." The facts hypothesized by the Board never materialized. At least for the prospective period, the court below should not have foreclosed administrative reconsideration of the remedy appropriate to the true employment situation.

CONCLUSION

For the foregoing reasons, the decision and orders of the court below should be reversed with the directions to vacate paragraphs 2 (d) and 3 (b) of the decree and remand to the Board so much of this cause as is affected by said paragraphs for further proceedings.

Respectfully submitted,

LOUIS N. WOLF,

SYLVAN BRUNER,

Attorneys for the Petitioners.

December, 1944.

* Compare, *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 119 F. (2d) 1009 (C.C.A. 7); *International Ass'n of Machinists v. National Labor Relations Board*, 311 U. S. 72, 82-83; *Century Metalcraft Corp. v. Federal Trade Commission*, 112 F. (2d) 443, 447 (C.C.A. 7).

APPENDIX

NATIONAL LABOR RELATIONS ACT

(49 Stat. 449)

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized

sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 5. * * * The Board may, * * * prosecute any inquiry necessary to its functions in any part of the United States.
* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
* * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for

the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (c) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part of the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any

time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any,

for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * *

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. * * *

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No. 337
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IN THE
Supreme Court of the United States

October Term, 1944.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS No. 15, 17, 107, 108 and 141, affiliated
with the Congress of Industrial Organizations,
Petitioners,
against

EAGLE-PICHER MINING AND SMELTING COMPANY, a corpora-
tion, EAGLE-PICHER LEAD COMPANY, a corporation,
and

NATIONAL LABOR RELATIONS BOARD.

**MOTION TO PERMIT CAUSE TO BE SUBMITTED
UPON ABBREVIATED PRINTED RECORD.**

LOUIS N. WOLF,
SYLVAN BRUNER,

IN THE
Supreme Court of the United States

October Term, 1944.

No.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS No. 15, 17, 107, 108 and 111, affiliated
with the Congress of Industrial Organizations,
Petitioners,

against

EAGLE-PICHER MINING AND SMELTING COMPANY, a corpora-
tion, EAGLE-PICHER LEAD COMPANY, a corporation,
and

NATIONAL LABOR RELATIONS BOARD.

**MOTION TO PERMIT CAUSE TO BE SUBMITTED
UPON ABBREVIATED PRINTED RECORD.**

Petitioners pray the Court to permit them to submit this
cause upon an abbreviated printed transcript of the record,
for the following reasons:

1. Petitioners have filed in this Court their petition for writ of certiorari, an abbreviated printed transcript of record in the Court below, and a stipulation signed by the Petitioners and the Solicitor General of the United States on behalf of the National Labor Relations Board specifying the material to be contained in the printed transcript of the record, all of which filed papers are made a part hereof. A copy of said stipulation is also set forth on pages 348-350 of said printed transcript of the record. Said printed transcript of record contains all of the material to be printed pursuant to said stipulation.

2. John G. Madden, Esq., attorney for the Eagle-Picher Mining and Smelting Company and the Eagle-Picher Lead Company, parties herein, has refused Petitioners' request that he sign said stipulation on behalf of said parties.

3. The original transcript of record filed in the Court below is mostly typewritten and very voluminous. It includes over 13,000 typewritten pages and approximately 300 exhibits. Your Petitioners believe that said material specified in said stipulation constitutes all of the material essential to a consideration of the questions presented by said petition for writ of certiorari, pursuant to Rule 38, section 8, of this Court.

4. In addition to said printed transcript of record, Petitioners have caused the entire original typewritten transcript of record filed in the Court below, and the original Exhibits 237, 238, 239, 260, 261 and 262 therein, to be certified by the Clerk of the Court below and filed in this Court, so that the entire record in the Court below to which any reference was there made in this case is now before this Court, with full opportunity to all parties to refer to any portion thereof.

5. Petitioners' time within which to apply for a writ of certiorari to review the decision and orders of the United States Circuit Court of Appeals for the Eighth Circuit in this case expires August 15, 1944.

WHEREFORE, your Petitioners pray for an order permitting them to submit this cause upon said abbreviated printed record on file in this Court and containing the material specified in said stipulation signed by the Petitioners and the Solicitor General of the United States, and for such other relief as may be proper.

LOUIS N. WOLF
SYLVAN BRUNER
Attorneys for Petitioners.

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Office of the Clerk of the Supreme Court, U. S.

SEP 9 1944

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 337.

INTERNATIONAL UNION OF MINE, MILL, AND
SMELTER WORKERS, LOCALS Nos. 15, 17, 107, 108
AND 111, AFFILIATED WITH THE CONGRESS OF
INDUSTRIAL ORGANIZATION, PETITIONERS,

VS.

EAGLE-PICHER MINING & SMELTING COMPANY, A
CORPORATION, EAGLE-PICHER LEAD COMPANY,
A CORPORATION, AND NATIONAL LABOR
RELATIONS BOARD, RESPONDENTS.

**BRIEF OF RESPONDENTS, EAGLE-PICHER MINING &
SMELTING COMPANY, AND EAGLE-PICHER LEAD
COMPANY, RESPONDENTS, IN OPPOSITION TO PETI-
TIONERS' MOTION TO PERMIT CAUSE TO BE SUB-
MITTED UPON ABBREVIATED PRINTED RECORD,
AND TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 337.

INTERNATIONAL UNION OF MINE, MILL, AND
SMELTER WORKERS, LOCALS Nos. 15, 17, 107, 108
AND 111, AFFILIATED WITH THE CONGRESS OF
INDUSTRIAL ORGANIZATION, PETITIONERS,

VS.

EAGLE-PICHER MINING & SMELTING COMPANY, A
CORPORATION, EAGLE-PICHER LEAD COMPANY,
A CORPORATION, AND NATIONAL LABOR
RELATIONS BOARD, RESPONDENTS.

BRIEF OF RESPONDENTS, EAGLE-PICHER MINING &
SMELTING COMPANY, AND EAGLE-PICHER LEAD
COMPANY, RESPONDENTS, IN OPPOSITION TO PETI-
TIONERS' MOTION TO PERMIT CAUSE TO BE SUB-
MITTED UPON ABBREVIATED PRINTED RECORD,
AND TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.

A

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of
Appeals for the Eighth Circuit, sought to be reviewed,
is now officially reported (R. 307; 141 F. 2d 843). The
opinion of the court, enforcing at the instance of the Na-
tional Labor Relations Board, the Order of the latter,
is also officially reported (R. 187; 119 F. 2d 903).

B.

JURISDICTION.

The jurisdiction of this Court is sought to be invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act. Such jurisdiction is lacking for the reasons hereafter appearing.

C.

STATUTES INVOLVED.

The statute of the United States allegedly involved is the following: National Labor Relations Act (29 U. S. C. A., Ch. 7, Sec. 151, *et seq.*; 49 Stat. 449). These respondents assert that these statutory provisions are not in fact involved.

D.

QUESTIONS PRESENTED.

The alleged questions presented, as specified (Pét. p. 4) by petitioners, are not actually presented by the opinion below. Neither the respective authority of the Board and the court below to act upon the appearance of newly discovered evidence, nor the respective authority of the Board and the court below to act upon a difference between established and hypothetical facts, nor the respective authority of the Board and the court below to act upon a showing of fundamental error, is involved. The court below merely held that there was no factual basis for any one of these three alleged questions presented. Hence this is an application for certiorari wherein the claimed questions presented are not involved because of a complete lack of factual basis therefor under the record. The scope of the opinion below, in substantiation of this statement,

can best be demonstrated by quotation (141 F. 2d 843, 1. c. 845):

"The National Labor Relations Board filed a petition in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2(d) and 3(b) of the final decree of this Court in this case dated and entered June 27, 1941, and to remand the subject matter of those paragraphs to the Board for further proceedings. The Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company have filed their answer to the Board's petition. The answer challenges this Court's jurisdiction and the sufficiency of the petition. The Board has now moved for judgment on the record and the pleadings, upon the grounds that no genuine issue of facts exists with respect to any material allegation of the petition and that the Board, as a matter of law, is entitled to the relief prayed for. The companies assert that the motion of the Board is without merit and should be denied and that the petition of the Board should be dismissed.

"We are not convinced upon the showing in these proceedings that the parts of the order and decree attacked were obtained by misrepresentation or wrongful conduct of the companies, or that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved.

"Our conclusion is that, while this Court has jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted, the petition of the Board and the record in this case present an insufficient factual basis for setting aside paragraphs 2(d) and 3(b) of the decree and for remanding the subject matter thereof to the Board. The motion of the Board for judgment upon its peti-

tion is, therefore, denied, and the petition is dismissed". (Italics ours).

E.

STATEMENT.

In the original proceeding an order of the National Labor Relations Board was entered (R. 25), which upon review was affirmed and enforced (R. 187).¹ These respondents vigorously opposed the entry of the decree as prayed by the Board; petitioners supported the Board in procuring the entry of such decree (R. 187). The findings of the Board are (with the exception noted) immaterial to the issues here involved; they are, however, quoted by petitioners at length for prejudicial purposes: We shall refrain from similar procedure. It appeared from the undisputed evidence, and is now undisputed even by petitioners, that following the strike in 1935 the employment level never rose to its former peak existing at the time of such strike. The Board, as a result, held that all of the pre-strike employees could under no circumstances have been reinstated, irrespective of whether such pre-strike employees were union or non-union members, claimants or non-claimants (R. 132 et seq.). *There is no dispute but that this conclusion was and is true.* In order, therefore, to meet the argument of these respondents that, under such admitted facts (admitted then and now), there was no showing that any particular claimant would, absent any conceivable discrimination, have been rehired, the Board conceived a remedy designed to compensate the claimants

¹As will be hereinafter noted the printed record here filed is entirely inadequate to present the issues sought to be submitted, as well as violative of the rules of this Court. As a result reference to the printed record will be thus designated (e. g. R. 1). References to the typewritten transcript, unprinted, will be thus designated (Tr. 1).

upon a fractional basis (141 F. 2d, l. c. 844). The claimants number 209, and the proof disclosed, the Board found, the court below found, that very shortly after July 5, 1935, there was available employment for them (119 F. 2d, l. c. 913, 914). Thus the court below in the original enforcement proceeding confirmed findings of the Board that, immediately after July 5, 1935, 364 jobs opened up, which were available for the 209 claimants (119 F. 2d, l. c. 913, 914):

"On July 5, 1935, the petitioners were operating with about 500 men. Their operations were not fully manned, and the evidence is that some men were taken on, so that by November 1, 1935, they were employing 864 men. The Board found, justifiably, that petitioners from July 5, 1935, to November 1, 1935, had jobs available". (Italics ours).

"This Court is of the opinion that if the evidence sustains the Board's finding that the striking employees would on July 5, 1935, or thereafter while jobs were available, have applied for reinstatement and would have returned to work except for the illegal condition of reinstatement imposed by petitioners, the Board had authority to make an appropriate order with respect to reinstatement and back wages" (Italics ours).

Thus there was no doubt in the mind of the then Board or of the court below that immediately after July 5, 1935, there was available employment for the 209 claimants. The then Board held, however, and the court below approved the discretionary remedy thereupon improvised, that the availability of jobs for the claimants was not the issue; if there had been no discrimination as charged, all pre-strike employees would have enjoyed equal rights but all could not have been rehired; and

that, therefore, there being no assurance that any one of the claimants would have been rehired, as against a non-claimant who was also a pre-strike employee, the claimant could at best enjoy only a proportionate, fractional back wage award. It should be stressed that it is conceded by petitioners that this fundamental premise of the Board remedy is true; it is not claimed that the post-strike employment level ever rose to the pre-strike employment level. The order of the Board was enforced by judicial decree (over the vigorous opposition of these respondents) on May 21, 1941 (R. 187).

On February 4, 1943 (R. 213), long after the decree procured by the Board and petitioners had become a finality, the successor Board filed its "petition for rule to show cause, to remand, and for other relief" (R. 213, 215, *et seq.*). It will be recalled that the "unusual condition" found by the original Board was that the post-strike employment level never reached the pre-strike employment level. The successor Board did not challenge this conclusion. It alleged, however, that its predecessor had been deceived into believing that on or after July 5, 1935, "there had been and would be less than sufficient work to afford employment to all the claimants" (R. 218). This deception allegedly occurred because these respondents "upon the hearing and thereafter, inadvertently or otherwise, withheld from the Board material facts peculiarly within their knowledge concerning the employment situation existing in the enterprise involved in the complaint" (R. 216). The contention was absurd in view of the fact that, with only 209 claimants, the Board (allegedly deceived) had affirmatively found from the proof that there were 366 new jobs created between July 5, 1935, and November 1, 1935 (R. 94). If, as the predecessor Board found, "498 men were employed (on July 5,

1935) and on November 1, 1935, 864 men were employed" (R. 94), then to argue to this Court that the then Board believed, and was deceived into believing, that there were insufficient new jobs after July 5, 1935, to accommodate 209 men, is plainly and contemptuously frivolous. The court below, moreover, pointed out that there was ample available employment for the 209 claimants since, according to the computation of the court, 364 jobs became available for the 209 claimants immediately after July 5, 1935 (119 F. 2d 913, 914). It is not strange, under these undisputed facts, that the court below (comprised of the same members who heard the original cause, who were familiar with the then record and the contentions made, and who therefore knew that no deception had been practiced) held that "the petition of the Board and the record in this case present an insufficient factual basis for setting aside paragraphs 2(d) and 3(b) of the decree and for remanding the subject matter thereof to the Board" (141 F. 2d, l. c. 845). Stronger language could have been properly used.

The Board petition to vacate the final decree was filed nearly two years next after the rendition of such decree (R. 213). As noted, it not only disclosed no new evidence, but disclosed only the facts known to the original Board and the court from the inception. The appendix (R. 231) was unverified. It purported merely to show, however, that there were more jobs after the strike than the number of claimants; this had been freely conceded by these respondents from the beginning; it had been found by the original Board and by the court. It was, as a result, entirely meaningless. In consequence these respondents filed a brief in opposition to being required to plead to a petition whose allegations were negatived by the record before the court. Without passing

upon the issues the court below ruled "that as a matter of orderly procedure the petition should be permitted to be filed and petitioners (respondents here) should be required to make formal answer thereto" (R. 281). Thereupon, pursuant to leave (R. 281), these respondents filed an appropriate pleading (R. 283). In turn the Board filed a motion for judgment (R. 291). These respondents countered by calling up their motion to dismiss. The cause was thereupon briefed, and argued. Petitioners have sought to incorporate in this record (without the authority of a bill of exceptions; or other recognized proof of authenticity) certain excerpts from the briefs filed by these respondents in the court below. We challenge the propriety of that procedure. If excerpts thus torn from context are to be considered, however, we feel that such briefs in toto should be before this court. These respondents could properly move to strike those unauthorized inclusions in the record, but are entirely willing that this Court should consider any brief by them filed. If, therefore, these excerpts torn from context are to be considered, we file herewith, as Exhibit A, the two briefs filed by respondents in the court below upon these issues. The Exhibit is entitled "Supplemental Brief on Behalf of Petitioners." It will be noted that the initial portion (pp. 1-26) constituted the final brief below; the subsequent portion (constituting the original brief below) was attached thereto. The complete absence of legitimate justification for the mis-statements of petitioners here is disclosed in the latter (pp. 2-43).

The opinion below was rendered on April 19, 1944 (R. 307). Thereafter, and for the first time, petitioners on May 4, 1944, filed a motion (R. 326, 327). On May 17, 1944, the court below denied both the Board petition for rehearing and the belated motion of petitioners (R. 343).

In proceedings below these respondents insisted that the pleadings, and the record already before the court, required both a denial of the Board motion for judgment and a dismissal of the Board petition. The Board allegations were insufficient; the Board allegations were affirmatively negated by the record before the court. This position of respondents was sustained upon the ground, heretofore noted in the opinion below, that there was no "factual basis" for vacating the final decree. It is apparent from the opinion that this conclusion was arrived at after a consideration of the entire record. Petitioners, however, now propose to apply for certiorari not upon a mere diminution of the entire record, but upon the most fragmentary excerpts therefrom. As petitioners concede, the entire record below, considered by the court in determining that there was no factual basis for the petition filed, comprised over 13,000 pages, exclusive of several hundred exhibits (Petitioners' Motion to Permit Cause to be Submitted upon Abbreviated Printed Record, p. 2). Mere lines, even words, of the certified record are torn from context. (R. 348). Equally (R. 349) are lines, and even words, from the briefs of these respondents (never incorporated in the record or in any bill of exceptions) torn from context. Reference to the initial brief of these respondents (attached to the supplemental brief designated as Exhibit A herewith) will show that hundreds of pages of the record below are directly material (p. 36). It is thus plain that an examination of the entire printed record, as submitted by petitioners, would not permit an intelligent consideration of this cause. Counsel for these respondents advised petitioners that he would comply with the letter and the spirit of paragraph 8 of Rule 38 of this Court. Petitioners, however, submitted the proposed stipulation to him before the petition for certiorari was filed. Omitted from the present ab-

abbreviated record are innumerable matters essential to a consideration of the questions presented by the petition for the writ. The abbreviated record will not sustain the most insignificant percentage of the statements appearing in the petition itself. If reference be made to the initial brief of respondents, attached to Exhibit A filed herewith, it will appear that the abbreviated record is insufficient for the slightest consideration of the issues of this cause. We, therefore, shall suggest a plain non-compliance with the rules of this Court.

It should be particularly noted that, following the decision below, the Board, possessing exclusive control over its orders and their enforcement, elected not to seek certiorari. Notwithstanding this decision on the part of the sole litigant possessed of the right to pursue this remedy, petitioners have herein sought to appropriate a prerogative exclusively enjoyed by a public administrative tribunal. They are without capacity so to do. From every aspect, therefore, the petition for certiorari must be denied.

F.

SUMMARY OF THE ARGUMENT.**POINT I.**

Petitioners' motion to permit cause to be submitted upon abbreviated printed record should be denied as violative of paragraphs 7 and 8 of Rule 38 of this court. Thereunder it is plain that it is the duty of petitioners: first, to file a certified transcript of the entire record; and, secondly, to print the entire record, except such portions thereof as may be omitted, pursuant to stipulation, as not essential to a consideration of the questions presented by the petition for the writ. The penalty for refusal to stipulate thereunder is a matter of costs. Here petitioners have failed to present a stipulation whereunder the matter essential to a consideration of the questions presented by the petition for the writ is included. Hence: (a) the motion to permit the cause to be submitted upon the inadequate abbreviated record must be denied because (1) the entire record has not been printed and (2) the abbreviated record, as printed, does not contain the matter essential to a consideration of the questions presented by the petition for the writ; and (b) the petition for certiorari must be denied because, the record not complying with the rules of this court, the petition is before the court without a record within the purview of paragraphs 1 to 8, inclusive, of Rule 38. Authorities: Rule 38 of the Rules of the Supreme Court of the United States, paragraphs 1 to 8, inclusive.

POINT II.

The present petition for certiorari is an attempt to discharge the administrative functions of the National Labor

Relations Board. This remedy is exclusively vested in the Board. Since the National Labor Relations Board has elected to pursue its remedy otherwise, petitioners cannot divest the Board of its inherent jurisdiction to determine in what manner the Act shall be effectuated. As a result, petitioners are without capacity to maintain or pursue their application for certiorari. **Authorities:** *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 270, 84 L. Ed. 738; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 370, 84 L. Ed. 799; *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757.

POINT III.

The decision below, upon a purely factual basis, cannot be, and is not, in conflict with the decision of any other circuit court of appeals on the same matter, has not decided an important question of federal law which has not been, but should be, settled by this court, has not decided a federal question in a way probably in conflict with applicable decisions in this court, and has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. **Authorities:** *Wisconsin Electric Co. v. Dumore Co.*, 282 U. S. 813, 75 L. Ed. 728; *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. Ed. 922; *United States v. Johnston*, 268 U. S. 220, 69 L. Ed. 925; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 190, 82 L. Ed. 1273, 1282; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413; *Stewart Corp. v. National Labor Relations Board*, 129 F. 2d 481, 1 c. 483.

POINT IV.

The decision of the court below was plainly correct, both factually and legally. Even if factual issues were re-

viewable by this court on certiorari, that decision was the exercise of a sound judicial discretion in the determination of an issue of fact, which is not subject to appellate review. No abuse of that discretion appears since the certified record plainly shows the absence of the grounds of misrepresentation or mistake alleged in the petition in the nature of a bill of review filed below. The so-called newly discovered evidence disclosed no facts not theretofore appearing in the record at the time of the entry of the decree. There is no authority which will support the vacation of this decree, and the remand to the Board sought, under these undisputed facts. The proceeding below was instituted exclusively upon the theory that the Board was misled into, or fell into the inadvertent error of, believing that on and after July 5, 1935, the new jobs opening up in the plants of these respondents were insufficient to furnish employment to 209 claimants. The record clearly shows that the evidence established, that these respondents conceded, that the Board found, that the court below held, that either 364 or 366 jobs opened up immediately after July 5, 1935. Hence the Board, the present petitioners, these respondents, and the court below, at all times, knew that available jobs exceeded the number of claimants. Under these circumstances the claim of deception or inadvertent error was a plain and frivolous absurdity which the court below properly denied. That was the sole issue presented to that court. No petition for a bill of review could be entertained, or sustained, upon that undisputed record. Authorities: *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100, 109, 86 L. Ed. 718; *National Labor Relations Board v. Indiana and Michigan Electric Co.*, 318 U. S. 9, 36, 87 L. Ed. 579; *Stewart Die Casting Corp. v. National Labor Relations Board*, 129 F. 2d 481.

ARGUMENT.

POINT I.

Petitioners' motion to permit cause to be submitted upon abbreviated printed record should be denied as violative of paragraphs 7 and 8 of Rule 38 of this court, and the petition for certiorari should be denied.

Non-compliance with rules persists throughout this application for certiorari. The entire purpose of paragraphs 1 to 8, inclusive, of Rule 38 of this Court is, as we apprehend, this: That, immaterial matters excluded, the printed record shall comprehend the entire record below to the end that, upon consideration of the application for certiorari, this Court shall be as well advised as the court below. We suggest that, if we are correct in these views, there has never been a record submitted to this Court as plainly fragmentary and inadequate as that here filed. The decision of the court below was based upon the entire record, encompassing more than 13,000 pages and several hundred exhibits. Yet, petitioners would pretend to bring before this Court half a dozen pages, from the many thousands, excerpts torn from context, with the assurance that those insignificant excerpts constituted the only material evidence after five months of trial. The refusal of counsel for respondents to execute that stipulation, under these circumstances, need not be further justified. The procedure followed by petitioners does not subserve an intelligent consideration of their application for certiorari; it prevents it. It casts the burden upon this Court of determining, upon an attenuated record of half a dozen pages, whether the

Court below was correct in its factual decision upon a consideration of 13,000 pages and several hundred exhibits. If such procedure upon review by certiorari should be approved, the burden of such review would be incredibly increased. The average litigant can tear a word or a sentence from context, and, if permitted to do so, find plausible support for his contentions. We apprehend that that is not the purpose of the rules of this Court. Not even that plausibility, it may be noted, here appears.

We have referred heretofore to the brief filed by these respondents below, and filed herewith as an exhibit. A reference to that brief will disclose that no part of the record relied upon by these respondents is included in the printed record herein filed. More than that: The very statements of fact relied upon by petitioners cannot be found in or supplied from that printed record. It is our understanding that the rules of this Court require that the entire record, under consideration of the court below, be here printed. The only exception to this doctrine is that counsel "should stipulate to omit from the printed record all matter not essential to a consideration of the questions presented" (Par. 8, Rule 38). We suggest that no one would require counsel for these respondents to stipulate to this fragmentary record as constituting all of the matter essential to a consideration of the questions presented.

We do not contend, we have never contended, that this entire record should or must be printed; we have contended, we do contend, that this pitiful fragment cannot constitute a compliance with the rules. No effort was made to arrive at an adequate printed record. A stipulation was arbitrarily submitted, even before the petition for certiorari was filed, and manifestly could not be accepted.

This non-compliance with rules in the proposed stipulation, and in the abbreviated record, has been followed into the petition. The questions presented do not conform to the specifications of error; the specifications of error do not conform to the reasons for the granting of the writ; and the latter conform to neither of the former. We do not insist upon technicalities; but we do insist that petitioners' failure to comply with the rules of this Court precludes any intelligent consideration of the issues raised by their application. No reference to the abbreviated record in this cause will permit an intelligent determination of these issues. Under these circumstances we submit that the motion to permit this cause to be submitted upon the abbreviated record should be denied, and the petition for certiorari dismissed.

POINT II.

Petitioners are without capacity to maintain the application for certiorari.

The petition in the nature of a bill of review was filed below by the Board. The decision thereon was rendered. Subsequently only did petitioners file their initial motion (R. 326). There can be no serious dispute but that the controversy adjudicated below involves the administrative remedies to be pursued by the Board in effectuating the purposes of the Act. After the decision adverse to the Board position was rendered by the court below, the Board, the only qualified litigant adverse to these respondents, elected not to seek certiorari. Petitioners, however, notwithstanding this decision of the public administrative agency, proceeded to apply for certiorari independently. The argument permeating their entire petition is that the court below has unduly curtailed the administrative rights and functions of the Board in enforcement of its findings.

Such enforcement is unmistakably the exclusive function of that administrative agency. Petitioners can neither supersede nor supplant the Board in the administration of its duties; and the Board in turn could not delegate the administration of such duties to petitioners. The latter plainly regard the Board order, enforced by the decree below, as constitutive of private rights to be prosecuted by private means; the contrary is true, that the rights are public, to be enforced only by the public administrative agency vested therewith. Under the law the Board formulates its order; under the law it determines in what Court, when, and by what method, it enforces such order. No other person, group or corporation is vested with that right. No person may object other than that person "aggrieved by a final order of the Board * * *" (National Labor Relations Act, Ch. 7, 29 U. S. C. A., Sec. 160 (f)). The relief thus extended, to such person aggrieved, is to apply for a review of the final order by the United States Circuit Court of Appeals. There is no pretense that petitioners were aggrieved by the final order of the Board, or sought such review. To the contrary, petitioners intervened to procure the decree which they now contest. When, however, petitioners now seek certiorari upon the ground that the administrative rights of the Board have been unduly curtailed, that their theory of Board authority is essential to the effectuation of the purposes of the Act, although the Board has elected not to proceed by certiorari but otherwise, then petitioners have plainly presumed to seize upon public rights as their own and are manifestly without capacity to sue. They felt it necessary to join the National Labor Relations Board in this proceeding as an adversary party. If the right to administer this Act were not exclusively vested in the Board, incredible conflicts would inevitably arise. The Board would be seeking

enforcement by contempt while an interested union would be seeking enforcement by vacation of a decree. The resulting confusion need not be stressed. The complete incapacity of petitioners to discharge the administrative functions of the Board by this application for certiorari, is explicit and unambiguous under controlling decisions: *Amalgamated Utilities Workers v. Consolidated Edison*, 309 U. S. 261, 84 L. Ed. 738; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799; *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757. In the first authority cited it is pointed out that no court has jurisdiction to entertain an attempt by any private person or group to discharge the administrative functions vested in the Board (l. c. 270), and that the only right vested in a private person or group is to contest a final order of the Board and not to enforce it (l. c. 266). Petitioners will not assert that they are contesting a Board order; they seek to enforce a claimed Board remedy. If, moreover, petitioners were to assert that they are seeking to contest a final Board order, then plainly they are some five years too late to do so under the Act.

The Board having elected not to pursue its remedy of certiorari from the adverse decision below, petitioners cannot succeed thereto, and in consequence are without capacity to maintain the proceeding.

POINT III.

The decision below, upon a purely factual basis, cannot be, and is not, in conflict with the decision of any other circuit court of appeals on the same matter, has not decided an important question of federal law which has not been, but should be, settled by this court, has not decided a federal question in a way probably in conflict with applicable decisions in this court, and has not so far departed from the

accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

We have heretofore noted that the alleged "questions presented" were not involved in the decision below, and that that decision was purely factual. A factual decision will not be reviewed upon certiorari. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273; *United States v. Johnston*, 268 U. S. 220, 69 L. Ed. 925. We suggest that petitioners have ignored the recognized limitations upon the function of certiorari. *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. Ed. 922.

Petitioners claim conflict only upon the basis of the decision in *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. 2d 909. It is difficult to see how there can be even a pretended claim of conflict. As the court pointed out in the authority cited, involving orders of the Federal Trade Commission, such orders are future and prospective in operation, and therefore may necessarily be rendered inappropriate by changing conditions. There is no claim in the instant case of any change of conditions; and the back pay order involved was a finality at the time of the rendition of the decree; by that decree rights were then fixed; such rights did not continue in futuro subject to changing conditions. Under the Federal Trade Commission Act, moreover, the Commission is specifically vested with power to modify or vacate its orders after final judgment, and the authority cited so holds. No such power is vested in the National Labor Relations Board. These respondents have recognized and stressed from the beginning the difference between a continuing and prospective decree, and a decree which gives protection "to rights fully accrued upon facts so

nearly permanent as to be substantially impervious to change." *U. S. v. Swift*, 286 U. S. 106, 76 L. Ed. 999. Respondents have heretofore cited (Orig. Br. p. 47) *Stewart Corp. v. National Labor Relations Board*, 129 F. 2d 481, 1. c. 483, as applicable to the instant case under that doctrine. There can be no question but that the back pay award in the instant litigation was designed to give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and there is no pretense that the action of the Board below, or the attempted action of petitioners here, has been sought because of any change of conditions subsequent to the entry of the decree. It may be noted that a purported conflict in decisions, moreover, arising from differences in fact, and not in the application of a principle of law, will not support certiorari. *Wisconsin Electric Co. v. Du-more Co.*, 282 U. S. 813, 75 L. Ed. 728.

The purported reasons advanced by petitioners may be very briefly considered: **FIRST:** Petitioners suggest that the Board, even after final decree, may at any time change its mind as to the remedy to be adopted to expunge unfair labor practices, and that the court must thereupon act as a mere automaton to permit the Board to do so (Pet. pp. 14, 15). The court below determined that there was no new evidence which did not already appear in the record, and hence that the Board could not frivolously decide to rescind one remedy which it had caused to be incorporated in a final decree, then years old, and adopt another. We assume that this Court will not accept the suggestion of petitioners that, after procuring a final decree, and the term having passed and the decree having become a finality, the Board may at any time determine that it should revise its order thus enforced. If such a doctrine were accepted, or even tentatively suggested judicially, all certainty

in labor relations would disappear. The Court below explicitly held that it was for the Board to determine how the effects of prior unfair labor practices should be expunged (119 F. 2d, l. c. 915). The claimed conflict is transparently unreal. The Board initially determines the method for expunging unfair labor practices, and thereupon seeks enforcement by the court. To suggest that, after the decree thus procured becomes a finality, the Board can vacate that decree at its own option, and sustain a petition for a bill of review in equity without adequate showing of fact, is to subordinate judicial processes to the vagaries of arbitrary administrative action. No authority, state or federal, justifies the position of petitioners. **SECOND:** "Petitioners argue that the cause should have been remanded to arrive at the specific amount of back pay awarded. The difficulty with the authorities cited by petitioners is that such authorities contemplate a remand for the determination of a concrete amount of back pay under the decree. The Board below sought a remand, not to enforce the decree, not to determine the amount of back pay due thereunder, but to vacate and destroy the decree. So far as these respondents know there is no authority which even intimates that a court must remand to an administrative agency its final decree for the purpose of the vacation, destruction, or modification of the latter. Certainly petitioners must recognize the distinction between an attempted remand for the enforcement of a decree, and an attempted remand designed for its abrogation. Courts of the United States are not compelled to divest themselves of their judicial function or to transfer such judicial function to an administrative agency. When the Board below filed its petition in the nature of a bill of review in equity, it undertook the burden of establishing the facts alleged. It is elementary that that factual issue was one for the

sound discretion of the court and such issue was the only issue determined below. **THIRD:** Petitioners contend that the discovery of new evidence, following an order of the Board, justifies a remand. This contention is apparently made under the provisions of Section 10(e) of the National Labor Relations Act (29 U. S. C. A., p. 239). It reads as follows:

"If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order."

Initially it should be noted that this provision applies exclusively to the action of the court before final decree, and not thereafter. The Board below did not proceed, moreover, under this section, but under the general equitable procedure of a bill of review. Even if this provision were applicable, moreover, the court below denied the remand upon factual grounds, namely, that there was no sufficient factual showing of the materiality of the claimed evidence (which was already in the certified record), or of any reasonable grounds for the failure to adduce such evidence theretofore. The action of a court on application to remand under these circumstances is, moreover, discretionary, and no abuse of the discretion here

appears. *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100, 1. c. 104, 86 L. Ed. 718; *National Labor Relations Board v. Indiana Electric Co.*, 318 U. S. 9, 1. c. 16, 87 L. Ed. 579. **FOURTH:** Petitioners further argue that, in any event, the back pay award was subject to remand for the period between the date of the close of the hearing before the trial examiner and the date of re-instatement. They cite no authority therefor. The simple answer to the contention made is that the Board order, and the final decree below, definitely and irrevocably fixed the rights involved. No change of conditions thereafter occurred, or are claimed to have occurred. No adjustment was sought either by the Board or petitioners in the intervening interim. There is no arbitrary right to vacate a decree, final by the lapse of the term, by a petition for bill of review without factual proof in support thereof. **FIFTH:** Petitioners urge that, since the Board charged that it had unearthed newly discovered evidence, the court was precluded from examining this position upon a petition for a bill of review, and mandatorially required to accept it. The absurdity of such a contention is its own refutation. When the Board below presented its petition to the court, it alleged deception and newly discovered evidence, together with a claim of due diligence; the certified record before the court disclosed that each of the claims was equally unfounded. Petitioners, however, contend that the court, as we have heretofore said, as a mere automaton was compelled to place the imprimatur of its approval upon a falsehood or falsehoods, and to vacate its decree and to remand the cause upon the mere demand of an administrative agency. It is self-evident that when the Board invoked the jurisdiction of the Court below to pass upon the factual issues of its petition for a bill of review, it necessarily submitted those factual issues to that court. Those issues have

been decided, and petitioners fail to point out any error in the decision. *SIXTH*: Petitioners further suggest that the Board was guilty of error. If it was, then the remedy of petitioners, as aggrieved litigants under the Act, was to file a petition for review. They did not do so, and, to the contrary, joined with the Board in procuring the decree incorporating the alleged error. There is no claim that this asserted error was subsequently revealed by reason of newly discovered evidence; to the contrary, petitioners now charge it was mathematical in character. If so, it appeared upon the face of the order which petitioners caused to be incorporated in the final decree below. This suggestion is too frivolous for further discussion. *SEVENTH*: Petitioners finally make an argument *ad hominem*. The concluding paragraph of the decision below is a complete answer thereto.

In view of this record it is not strange that the Board elected not to pursue any remedy by certiorari. Petitioners cannot do so.

POINT IV

The decision below was correct; the court exercised its discretion properly under the undisputed facts; and certiorari is not justified.

In view of the fact that petitioners, by incorporating in the abbreviated printed record limited excerpts of the briefs of respondents below, have compelled the latter to file those briefs as Exhibit A hereof, in the interests of brevity we adopt the argument therein made. We refer particularly to the original brief of respondents attached to the supplemental brief (immediately following page 26 thereof). Therein (pp. 2-43) the theory of the Board below, the original Board findings, the Board remedy, the initial opinion of the court below, the Board petition in this proceeding, the appendix to the Board petition, the Board brief,

the facts embraced in over 13,000 pages of record, the arguments made during the course of the litigation, are analyzed to show conclusively the complete absence of merit in the allegations of the Board in its petition in the nature of a bill of review.

It would extend this argument interminably if we were to review these record facts again. We have noted heretofore that it is undisputed that the employment level following the strike never rose to the pre-strike level. This did not mean, these respondents did not assert, that there were not more than 209 new jobs available after July 5, 1935. We have heretofore noted that the Board found, the court below found, that there were nearly 400 jobs available immediately after July 5, 1935. The original Board properly held, however, that, in view of the reduced employment level, there was no certainty that the 209 claimants would have received 209 of these available positions if there had been no discrimination whatsoever. That was the whole basis of the formula of the original board. The subsequent claim, made in the court below, was plainly an afterthought. The court below so held.

As indicated in the briefs filed herewith as Exhibit A (and so filed solely because excerpts therefrom have been by petitioners torn from context and incorporated in the purported record here), the court below could have predicated its decision equally well upon legal grounds. It did not do so, but preferred to review the entire record to determine whether there was the slightest scintilla of merit in the allegations made by the Board. Upon that review it determined that the Board claim, under the pleadings and the record already before the Court, was so plainly unsupported that it concluded:

"Our conclusion is that, while this Court has jurisdiction over the enforcement of all of the pro-

visions of its decree which remain unexecuted; the petition of the Board and the record in this case present an insufficient factual basis for setting aside paragraphs 2 (d) and 3 (b) of the decree and for remanding the subject matter thereof to the Board. The motion of the Board for judgment upon its petition is therefore denied and the petition is dismissed."

Petitioners' motion to permit cause to be submitted upon the abbreviated printed record, and their petition for certiorari, should be denied.

Respectfully submitted,

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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS NOS. 15, 17, 107, 108, AND 111,
AFFILIATED WITH THE CONGRESS OF INDUSTRIAL
ORGANIZATIONS, PETITIONERS

v.

EAGLE-PICHER MINING AND SMELTING COMPANY,
A CORPORATION, AND EAGLE-PICHER LEAD COM-
PANY, A CORPORATION, AND NATIONAL LABOR RE-
LATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS
BOARD

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LATIONS BOARD**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS
BOARD**

OPINIONS BELOW

The opinion of the court below denying the motion of the National Labor Relations Board for judgment on its petition to vacate portions of the decree and to remand (R. 307-311) is reported in 141 F. (2d) 843. The court's memorandum opin-

ion granting permission to the Board to file the petition (R. 281) is not reported; its order denying petitioners' motion to modify the decree or to remand (R. 343) was entered without opinion. The court's opinion enforcing the Board's order is reported in 119 F. (2d) 903. The findings of fact, conclusions of law, and order of the Board (R. 25-180) are reported in 16 N. L. R. B. 727-882.

JURISDICTION

The order denying the Board's motion for judgment on its petition to remand and dismissing the petition (R. 311-312) was entered by the court below on April 19, 1944. The Board's petition for rehearing was denied May 17, 1944 (R. 343). The order denying petitioners' motion to modify the decree or remand was entered by the court below on May 17, 1944 (R. 343). The petition for a writ of certiorari was filed on August 11, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals, having entered a decree enforcing an order of the National Labor Relations Board, may foreclose reconsideration by the Board of the appropriateness of its back-pay award and make an independent

judicial determination that such administrative reconsideration is unnecessary.

2. If the Circuit Court of Appeals does have the power to foreclose administrative reconsideration of the remedy prescribed, whether it abused this power by refusing a remand to the Labor Board in view of an undenied claim that the Board committed a verbal error in prescribing the back-pay award which, in the light of newly-discovered evidence as to the availability of employment during the period both prior and subsequent to the Board's order inevitably results in a substantial distortion of the back-pay remedy.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, pp. 26-29, *infra*.

STATEMENT

In proceedings instituted upon charges filed by the petitioners, International Union of Mine, Mill & Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111, hereinafter called the Unions, the Board decided that the Eagle-Picher Mining and Smelting Company and the Eagle-Picher Lead Company, hereinafter called the Companies, had committed unfair labor practices in violation of Sections 8 (1) and (3) of the Act (R. 25-166), and entered an order, on October 27, 1939, requiring them to cease and desist from their unfair labor practices and to take certain affirmative

action, including the reinstatement of 209 employees with back pay to be computed according to a formula set forth in the Board's decision (R. 166-180). On June 27, 1941, on petition of the Companies for review and request of the Board for enforcement in which the Unions joined as interveners (R. 182-185), the court below entered a decree enforcing the Board's order, with modifications not here material (R. 208-212). On August 23, 1941, the Companies offered reinstatement to the 209 employees (R. 224, 287). On or about May 1, 1942, the Companies tendered the sum of \$8,409.39 as full payment of all the back pay due under the decree (R. 224-225, 287-288). Subsequently the Companies withdrew their tender of \$8,409.39 and offered \$5,400 as the full amount due and owing (R. 225). Thereupon, the Board, in accordance with its usual compliance procedures, examined the payrolls and records of the Companies to verify the accuracy of the Companies' computations and to ascertain whether the affirmative provisions of the order had been fully executed (R. 225-226, 287). During the course of its compliance investigation, the Board became convinced that the provisions of its order respecting back pay contained certain errors and mistakes, and that in framing such provisions, it had misconceived the facts respecting the availability of employment with the Companies, both prior to and since the hearing, for the 209 employees (R. 217).

The Board and the Unions, therefore, each filed petitions in the court below requesting a remand to the Board of so much of the proceedings as was necessary to permit the Board to reconsider its back-pay remedy (R. 215-280, 329-342). The facts upon which the petitions to remand were based are as follows:

On May 8, 1935, a strike caused mines, mills, and smelters operated by the Companies to be closed down for a period of several weeks (R. 39-40). At the hearing held before a trial examiner of the Board, evidence was introduced indicating that upon resumption of operations on or about June 12, 1935, the Companies discriminatorily refused to rehire the 209 employees, herein-after called the claimants (R. 45, 74-99, 130-131, 172-176). Defending against the charge of discrimination and the prospective remedy of reinstatement and back pay, the Companies introduced evidence to show that the number of workers they employed was drastically curtailed after July 5, 1935, the effective date of the Act. They showed that after operations were resumed, mines were sold, operations at other mines were suspended, and that a reorganization of production methods resulted in reduction in the size of crews, the abolition of specific jobs and, in general, a need for fewer employees (R. 10-18, 185-186). They also showed that in restaffing after the strike, they quickly eliminated new employees as former employees applied (R. 17-18), and that over ninety

percent of those working after the strike had been regular employees before the strike (R. 9). The Trial Examiner recommended reinstatement of some of the claimants with back pay (R. 30). The Companies excepted to these recommendations, stating that as to each such claimant the recommendation "ignores * * * that there is no evidence that said person's former employment or any employment with the respondent or either of them was available on and after July 5, 1935"; that such claimant's former employment had "disappeared due to a change of operations" and was no longer available; and, further, that such recommendation "ignores the evidence of respondents' requirements and availability of work * * *" (R. 18-21, 219).

The Board found that, although as the Companies had urged, there had been a contraction of operations after the strike, the claimants had, on July 5, 1935, and at all times thereafter, been discriminatorily excluded as a class from such jobs as were available (R. 98-99, 101, 132, 146). The Board determined that the claimants should be reinstated (R. 131). It pointed out in its decision that in such situations it ordinarily required the employer to make whole each employee by giving him back pay for the period of discrimination based on his previous wages (R. 132), but that it would depart from that remedy in this case because it found that the number of jobs available for all employees after July 5, 1935, was and

would be insufficient to take care of all claimants and other old employees who applied for work (R. 98, 132-133, 134, n. 186). Since all the employees were equally qualified for most positions, and no special skill or abilities ordinarily were necessary, the Board assumed that the claimants, upon resumption of operations and in the absence of discrimination would have shared in employment opportunities proportionately with the other old employees who applied for work, hereinafter called reapplicants (R. 100, 101, 102, 132). However, the Board was not able to determine which specific claimants normally would have been rehired (R. 132-133). Turning "to the only solution that seems fair, workable, and calculated to serve the purposes for which it is intended," the Board directed that reimbursement to the claimants be effectuated pursuant to a special arithmetical formula which it thereupon devised (R. 133).

In substance the formula provides as follows: The amount of "all wages" paid by the Companies "to all persons hired or reinstated" from and after July 5, 1935, until the date of compliance by the Companies with the reinstatement provisions of the Board's order should be computed as a lump sum (R. 133). Since the Board could not assume that the claimants alone would have received the available jobs had the Companies acted lawfully, the Board directed that only a propor-

tionate amount of the wages constituting such lump sum should be allocated to the claimants (R. 133-134). This proportion was based upon the ratio which the claimants bore to the total number of pre-strike employees seeking their jobs back after July 5, 1935. As the method of arriving at this proportion, the Board specified that a fraction be constructed which should have for its numerator the number of claimants, and for its denominator the number of claimants plus reapplicants (R. 134). The Board directed that so much of the lump sum as was embraced by this fraction be apportioned among the claimants, after deducting from the distributive share of each; the sum of his net earnings elsewhere (R. 134). Illustrating its purpose, the Board gave a hypothetical example wherein the lump sum amounted to \$360,000, and there were 200 claimants and 100 reapplicants. Since presumably "two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully * * * two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against" (R. 134).

Neither the Board's order nor the court decree enforcing it fixed the amount of back pay in dollars and cents but left the determination of the exact sum to be made after the claim period would be closed by reinstatement of the employees.¹

¹ This is in accordance with the Board's established practice, in cases in which reinstatement must be made after the

Here the hearing closed April 28, 1939 (R. 27) and the period for which back pay was due under the Board's order and the court decree enforcing it did not close until August 23, 1941, when the period of discrimination was terminated by the Companies' offer of reinstatement to the 209 employees (R. 224, 287). In its investigation and analysis of the Companies' records begun immediately after the Companies' tender on or about May 1, 1942 (see p. 4, *supra*), and completed in October 1942, the Board discovered that the Companies, at virtually all times after July 5, 1935, had been steadily employing new employees (in addition to reapplicants) in numbers equal to and at times in excess of the total number of claimants and reapplicants, and at virtually all times had been fully able to employ all claimants and all reapplicants (R. 224-226, 268-280, 287, 294-296, 301-302, 305-306). The Board, therefore, concluded that it had been misled by the Companies' evidence and contentions that at no time after the strike had jobs been available for the full number of claimants and reapplicants (R. 216-223). It decided that because of its misconception arising from the Companies' misrepresentations, it had never considered what would

close of the hearing, of not taking any evidence at the initial hearing respecting the actual amount of back pay due. One of the reasons for this practice is that such evidence, under the circumstances, could not be complete. See National Labor Relations Board, *Fifth Annual Report* (Gov't Printing Office, 1949), p. 128.

be the appropriate remedy, and its prior back pay order had been "grossly unsuited to the situation which has now been discovered actually to have existed prior to and since the hearing" (R. 217). It therefore filed a petition in the court below stating the foregoing facts and requesting the court to enter appropriate orders to permit the Board to reconsider the back-pay provisions of its remedy (R. 213-230). The Board stated that in the event of such a remand, "the Board will for the first time be in a position to consider and, pursuant to its statutory duty, will consider the actual facts in order to prescribe a remedy appropriate to the true conditions. The Board can then correct the gross inequity now discovered and adequately provide for the effectuation of the purposes of the Act and the protection of the public interest" (R. 229).

It was also discovered during the compliance investigation that the formula, which the Board devised because of its findings respecting curtailed employment opportunities, contained an obvious mistake which, while entirely harmless in the employment situation then understood to exist by the Board, served to reduce back pay, in the light of the facts subsequently disclosed, to but a small fraction of the intended sum.² The Board asked

² While a dispute exists between the parties as to how much back pay is due, assuming the Board's decision must be applied without correcting the mistake, there can be no doubt that the mistake reduces the back pay to less than one-fourth

the court below to remand on the basis of the inapplicability of the formula as a whole, which included the footnote in which the mistake occurred, but the mistake was specifically called to the court's attention by the Unions, the petitioners here (R. 336). The Board admits that the formula contains the mistake which the Unions set forth in their petition (pp. 10, 20-21) and further admits that such mistake renders the formula wholly inaccurate as a measure for back pay. This mistake appears in footnote 185 which provides (R. 133):

If at any given time during this period [of discrimination] the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum.

Correctly worded so as to achieve the Board's stated objective, footnote 185 should read:

If at any given time during this period the number of such new or reinstated em-

of the amount which the claimants would have received under the Board's usual back-pay remedy. According to the Board's calculations, based upon its investigations, the 209 claimants, under the Board's normal remedy of full back pay, would receive approximately \$800,000 in reimbursement for the net loss which they had sustained, after allowance for interim earnings elsewhere (R. 227-228). Apportionment among the 209 claimants of the sum of \$5,400, which the Companies claim is all that they are required to pay under

employees then working exceeds the number of claimants discriminated against *plus the number of old employees reapplying*, only the earnings of a number of such employees equal to the number of claimants discriminated against *plus the number of old employees reapplying* shall be counted in computing the lump sum.

The omission of the italicized words from the footnote causes the back-pay award to depart from the Board's expressed intention to make the claimants whole to the extent that employment opportunities for claimants and reapplicants would have permitted their employment absent the discrimination. Instead of limiting the back pay provided for the claimants to the full amount of their loss, it so limited the lump sum of which the claimants receive only a fractional share. Consequently the claimants, even where full employment would have been available, were limited to a small portion of their loss in wages.³

the back-pay provisions of the Board's order, would afford the claimants recompense for less than three-fourths of one percent (.0075) of the loss which the Companies wilfully caused them during its six-year period of refusal to comply with the Act (R. 228). The Board's computations of the amount which would be due if the mistake remains uncorrected, while not yet complete because of the prolixity of the elements involved and the time-consuming process which the mistake imposes, nevertheless indicate that the claimants will lose more than 75 percent of the amount which they would have earned had the Companies acted lawfully.

³ The formula likewise illogically requires that in determining the net amount of back pay due, there be deducted from the pro-rata gross share of each claimant as computed under

On November 16, 1943, on the record and on the admissions contained in the Companies' answer to the Board's petition, the Board moved that the Circuit Court of Appeals enter a judgment permitting the Board to reconsider its remedy as requested in its petition (R. 293-304). On April 19, 1944, the court handed down its opinion denying the Board's motion and dismissing its petition (R. 307-312). The court treated the petition as "in the nature of a bill to review to set aside, for fraud, mistake and newly discovered evidence" the back-pay provisions of the prior decree entered by the court in enforcing the Board's order (R. 307). It stated that it was

the formula, the full amount of such claimant's net interim earnings" (R. 135), whereas the theory upon which the formula was devised would warrant deduction only of a pro rata share of his net interim earnings. The formula is based on the assumption that, even though there had been no discrimination in rehiring, not all of the claimants would have been rehired, and because it was impossible to determine which would have been rehired, the formula provides that each should get a pro rata share of the amount of wages which would have gone to those who would have been reemployed. On the same assumption, the Companies should be entitled only to credit for the earnings of those who would have been rehired, and since it is impossible to determine those individuals, the amount of net earnings to be deducted should be prorated on the same basis. Failure to provide for such a prorating of the earnings to be deducted means that while only part of the claimants are treated as having worked for the Companies insofar as their recovery of wages is concerned, they are all assumed to have been working when it comes to reducing the liability of the Companies for making them whole.

"not persuaded that the Board departed from the form of order by which it 'ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay' in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as [to] the composition of the staff of workmen" (R. 309). It therefore concluded that the back-pay provisions of the decree were not "obtained by misrepresentation or wrongful conduct of the Companies" (R. 310). The court also stated that it was not convinced "that on account of any mistake of the Board perversion of justice or unfair Administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 311). The Unions' request for modification of the decree or remand, and the Board's petition for rehearing were denied on May 17, 1944 (R. 343).

ARGUMENT

1. We agree with petitioners that the decision below conflicts in principle with the decision of the Circuit Court of Appeals for the Fourth Circuit in *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909. After the latter court decreed enforcement of an order of the Federal Trade Commission (139 F. (2d) 622), the parties against whom the order was

directed petitioned the Commission to stay enforcement of its order until after the war. As additional relief they asked that the Commission join with them in a request for modification of the decree of enforcement. The Commission denied the motion, taking the position that neither the Commission nor the court had power to stay enforcement of the order at that stage of the proceedings. A writ of mandamus was then sought to compel the Commission to consider and decide petitioners' motion on its merits. The court granted the application so as to require the Commission to "exercise the administrative power delegated to it by Congress" (142 F. (2d) 909, 912). The court noted that "the necessity for modification may be just as urgent in the case of an order which has been affirmed and ordered enforced by the Circuit Court of Appeals as in the case of one which" has not been subject to judicial review (p. 911). It held that the power of a circuit court of appeals over administrative remedial orders "is appellate and revisory merely," and does not include any power to grant or withhold remedial relief after enforcement, a power "essentially administrative in character" (p. 911 and note).^{*} It held, further, that the court had no power to modify the decree where the Commission

^{*}The Circuit Court of Appeals for the Fourth Circuit, in denying a stay of its decree enforcing an order of the Federal Trade Commission in an earlier case, stated that the determination of whether a stay should be granted "is more prop-

had not itself modified its order, "since the decree is based on the order, not on the conditions which called it forth" and stated that "to hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement" (p. 913). The court observed that "there is no danger that the decree of the court may be flouted by such modification", for "any action taken by the Commission would then be subject to review by the Court, as in the case of other orders * * * " (pp. 912, 913). The portions of Section 5 (b) of the Federal Trade Commission Act, 38 Stat. 717, 720, as amended (15 U. S. C. 45 (b)), which the Fourth Circuit Court of Appeals construed in making its decision, served as a model for Section 10 (c) of the National Labor Relations Act.⁵

erly within the province of the Commission rather than the courts. We are of the opinion that we have no power to order any delay in the putting into effect of a lawful order of the Commission." *El Moro Cigar Co. v. Federal Trade Commission*, 107 F. (2d) 429, 432.

⁵ Section 10 (d) of the National Labor Relations Act (*infra*, p. 26) was copied almost verbatim from Section 5 (b) of the original Federal Trade Commission Act. While Section 5 (b) was slightly altered in form by the 1938 Amendments to the Federal Trade Commission Act, there is nothing in the wording of the changes or the legislative history thereof which shows any intention to alter its meaning insofar as the instant question is concerned. A comparative analysis of the wording of Section 5 (b) before and after the amendments appears in H. Rep. No. 1613, 75th Cong., 1st Sess., p. 15.

While we do not entirely agree with the ruling in the *American Chain and Cable* case, we believe it is correct insofar as it denies the power of the circuit courts of appeals, after enforcement of an administrative order, to foreclose administrative reconsideration of the appropriate remedy. The court below affirmed its power to permit a modification of the order (R. 311), and the provision in Sections 10 (e) and (f) of the National Labor Relations Act making the decree of the circuit court of appeals final, subject to appropriate review by this Court, cannot mean that no tribunal has the power to rectify mistakes (*Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2)) or to adjust the provisions of the decree where changed circumstances require such adjustment (see pp. 20-21, *infra*). Given such a power, we believe that the necessities of proper administration require that that power, in the first instance, be exercised by the administrative agency. "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194.

The remedying of unfair labor practices is not within the province of a judicial tribunal which is neither endowed with the requisite background of

special experience nor intended by Congress to deal with such matters. Thus, in substituting its judgment for that of the Board, and in making a judicial determination that the mistakes made by the Board did not result in "unfair administration of the Act" (R. 310), the court below did not advert to any of the factors which the Board would weigh in determining whether the administration of the Act required that the Board's mistakes be corrected. The Board would judge the issue not in terms of righting a private wrong, but in terms of the extent to which the effect of the employer's economic recrimination has been neutralized and the employees assured of their rights under the National Labor Relations Act. In this case, it is not only individual workmen who suffer from a failure to rectify the Board's error; the public interest sustains an injury which is inevitably more far reaching and more lasting; the Government, in its protective role, has been proved impotent. Employers who have already shown a disposition to discriminate against employees for union activities can now convey hints, suggestions, and outright threats with great persuasiveness, for the remedial processes provided by law have come to naught. This case, with its tale of company-induced intimidation, terror and violence noted by the Board in its decision (R. 41-42, 44-48, 55-63), and its demon-

stration of company willingness to withhold employment from the claimants for six years, is an impressive instance of the unfortunate ultimate effect where Government intervenes and fails to protect. The Board sought an opportunity to re-appraise and act anew.

If in the Board's judgment further hearings and consideration are necessary to discharge its duty, the courts should not be permitted to gainsay that judgment. It is true that under the decision of this Court in *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 370, the Board does not have an absolute right to reconsider its order while its enforcement proceeding is pending before the circuit court of appeals. But this decision was not a denial of the special competence of the administrative agency to deal with its remedial orders; it was merely a necessary adjustment to allow the court to dispose of the case before it without the intrusion, at the same time, of another tribunal. The *Ford* ruling does not foreclose modification after the court's functions have been completed. Thus in *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909, 912, the Fourth Circuit Court of Appeals stated that the purpose of the statutory provision allowing modification by the Commission "if no such petition" for review has been filed was "to suspend the power of the Commission to modify its orders while petitions for review there-

of are pending in the Circuit Courts of Appeals, so as to avoid conflicts of jurisdictions; but, after a Circuit Court of Appeals has acted upon a petition for review, there is no reason why the Commission should not modify its order, if modification is warranted by the changed conditions contemplated by the statute." Then too, even while the transcript of the record is pending before the court on review of a Labor Board order, under the provisions of Section 10 (e) of the Act, the court does not decide whether the order of the Board should be modified on a motion for leave to introduce new evidence which may result in a modification of the order, but is confined to a decision as to whether the additional evidence is material and whether there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board.

The Companies did not end their discrimination against the claimants until several months after entry of the decree for enforcement (R. 224, 287). The Board's order, providing back pay not merely for the period preceding its order but for the subsequent period, which would terminate only when the claimants were reinstated in compliance with the order (R. 132-135), necessarily looked to the future; its operation was in greater part prospective. Not only was the provision for computing back pay for the period prior to the order based on the finding that there were not enough jobs for all

claimants and reapplicants (R. 98-99, 101, 132), but the same method was provided for the period after the issuance of the order, simply in anticipation of a continuing insufficiency of available employment. However, subsequent to the close of the hearing, it appeared that there was in fact sufficient employment to provide jobs for all claimants and reapplicants at all times (R. 225, 268-280, 286-288, 305-306), so that the remedy as framed was rendered inapplicable because of the changed circumstances after entry of the decree. It has always been assumed that the Board could change its order in such an event. Cf. *Franks Bros. v. National Labor Relations Board*, 321 U. S. 702, 705; *International Ass'n of Machinists v. National Labor Relations Board*, 311 U. S. 72, 83. Thus, insofar as the order of the Labor Board was a continuing order, the court did not have the power to foreclose administrative reconsideration of the appropriate remedy.

As this Court has said, "The Board is given no power of enforcement. Compliance is not obligatory until the court, on petition of the Board or any party aggrieved, shall have entered a decree enforcing the order as made, or as modified by the court." *In the Matter of the National Labor Relations Board*, 304 U. S. 486, 495. Thus ultimate judicial review, properly confined, would not have been foreclosed had the court remanded this case to the Labor Board.

2. If the Circuit Court of Appeals, however, does have the power to decide whether the Board should have an opportunity to exercise its judgment as to whether the back-pay order should be modified, it should properly have considered the factors that the Board would have considered on a remand, (*supra*, pp. 18-19).⁶ We believe that on a proper consideration of these factors, the court should have allowed the Board to reconsider the back-pay provisions of its order. The denial by

⁶ The court erroneously considered other factors. Its statement that in decreeing enforcement of the Board's order "The Judges were not in agreement on the fundamental question whether the Board could make any compensatory award to the group of 209 employees at all under the circumstances established" (R. 310), is contrary to the opinion handed down at the time of the enforcement decree and furthermore seems wholly irrelevant to the issue of the Board's power to reconsider. All three judges sustained the back-pay provisions as to the group of 209 claimants generally but one judge believed that a small number of "striking employees who were not shown to have been willing to abandon the strike and to return to work prior to November 1, 1935" should have been excluded from both reinstatement and back pay, because "the absence of evidence to justify a finding that the loss of wages suffered by these members of the group was attributable to the unfair labor practice of petitioners" made the order penal (119 F. (2d) 903, 915). The majority sustained the Board's finding that the whole group of 209 employees were willing to return at all times after July 5, 1935, if the Companies would reemploy them without imposing the requirement that they join the company-sponsored union (119 F. (2d) at p. 914). Furthermore, the opinion of the court upon enforcing the order indicates that the court then assumed, as did the Board, that, because of curtailed employment, the sum to be apportioned was the wages lost

the court of this opportunity we believe to have been an abuse of its discretion. Although the Board devised the formula because it believed that full employment opportunities were not available, we concede that the formula, properly worded, might have operated fairly well in a situation in which full employment was available to all claimants and reapplicants (see opinion of the court below at R. 309). But the textual error in footnote 185 must necessarily cause application of the formula in such circumstances to distort the back-pay remedy (*supra*, pp. 11-12). And yet, when this error was called to the court's attention by petitioners, their motion to modify the decree or remand the case to the Board was denied without opinion (R. 343). The opinion of the court denying the Labor Board's petition for a remand might be read as suggesting that that relief is premature and must await computation of back pay under the terms of the decree as entered (R. 310). But since the result of such a computation, as we have shown, could not help but be totally inadequate, we submit that this litigation should not be further prolonged after the employees have waited by the group (119 F. (2d) at pp. 914-915), and did not understand that the apportionment was to be a mere fraction of the wages lost by the group, as the court now states it then ruled because of circumstances other than the availability of employment (R. 310).

In addition to the mistake, the formula also contains ambiguities all of which the Companies have resolved in their favor in order to make their offer of only \$5,400.

for more than nine years for an adequate remedy.* The role of the Companies in this case is not of such a character as to lead this Court to decide that the decree below should be accorded finality. The evidence of conscious misrepresentation on their part is persuasive, and under these circumstances, the court below should have permitted reconsideration by the Labor Board.

In addition, the decision of the court below, refusing to allow the Board to modify its order even insofar as it referred to the period subsequent to the Board's order, is in conflict with decisions of this and other courts holding that a subsequent material change of circumstances warrants modification of the decree where the latter has become inapplicable. *United States v. Swift & Co.*, 286 U. S. 106; *Corning Glass Works v. National Labor Relations Board*, 129 F. (2d) 967, 972 (C. C. A. 2); *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 119 F. (2d) 1009, 1010 (C. C. A. 7); *Century Metalcraft Corp. v. Federal Trade Commission*, 112 F. (2d) 443, 447 (C. C. A. 7). And see *Franks Bros. v. National Labor Relations Board*, 321 U. S. 702, 705.

CONCLUSION

The petition for certiorari presents a question of importance in the field of administrative law

* A part of the delay in the proceedings is directly attributable to an injunction at the suit of the Companies restraining the Board from proceeding against them. *Eagle-Picher Lead Co. v. Madden*, 15 F. Supp. 407 (N. D. Okla.), reversed, 90 F. (2d) 321 (C. C. A. 10).

which has not been decided by this Court and there is a conflict of decisions. For the foregoing reasons we join the petitioners in requesting that a writ of certiorari issue.

Respectfully submitted.

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National Labor Relations Board.

SEPTEMBER 1944.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new find-

ings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and

shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL UNION OF MINE, MILL AND
SMELTER WORKERS, LOCALS Nos. 45, 17, 107, 108,
AND 111, AFFILIATED WITH THE CONGRESS OF IN-
DUSTRIAL ORGANIZATIONS, PETITIONERS

v.
EAGLE-PICHER MINING AND SMELTING COMPANY,
A CORPORATION, AND EAGLE-PICHER LEAD COM-
PANY, A CORPORATION.

AND

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below denying the motion of the National Labor Relations Board for judgment on its petition to vacate portions of the decree and to remand (R. 307-311) is reported at 141 F. (2d) 843. The court's memorandum

opinion granting permission to the Board to file the petition (R. 281) is not reported; its order denying petitioners' motion to modify the decree or to remand (R. 343) was entered without opinion. The court's opinion enforcing the Board's order (R. 187-208) is reported at 119 F. (2d) 903. The findings of fact, conclusions of law, and order of the Board, as amended (R. 25-180, 181-182), are reported in 16 N. L. R. B. 727-882 and 18 N. L. R. B. 320.

JURISDICTION

The order denying the Board's motion for judgment on its petition to remand and dismissing the petition (R. 311-312) was entered by the court below on April 19, 1944. The Board's petition for rehearing was denied May 17, 1944 (R. 343). The order denying petitioners' motion to modify the decree or remand was entered by the court below on May 17, 1944 (R. 343). The petition for a writ of certiorari, filed by the Unions, was granted on October 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Circuit Court of Appeals, which previously had entered a decree enforcing an order of the

National Labor Relations Board, erred in denying the Board leave to reconsider the back-pay provisions of the order and decree, notwithstanding that the Board had made errors in its award which, in the light of newly-discovered evidence as to the availability of employment during the period both prior and subsequent to the Board's order, inevitably result in a substantial distortion of the back-pay remedy.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, pp. 60-63, *infra*.

STATEMENT

In proceedings instituted upon charges filed by the petitioners, International Union of Mine, Mill and Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111 (hereinafter called the Unions), the Board found that the Eagle-Picher Mining and Smelting Company and its parent, the Eagle-Picher Lead Company (hereinafter called the Companies), had committed unfair labor practices in violation of Sections 8 (1) and (3) of the National Labor Relations Act (R. 25-128), and entered an order, on October 27, 1939, requiring them to cease and desist from their unfair labor practices and to take certain affirmative action, including the reinstatement of 209 employees with back pay to be computed according to a formula set forth in the Board's decision (R. 166-180,

181-182). On June 27, 1941, on petition of the Companies for review and on request of the Board for enforcement, in which the Unions joined as interveners (R. 182-184, 185), the court below entered a decree enforcing the Board's order, with modifications not here material (R. 208-212). On August 23, 1941, the Companies offered reinstatement to the 209 employees (R. 224, 287). On or about May 1, 1942, the Companies tendered the sum of \$8,409.39 as full payment of all the back pay due under the decree (R. 224-225, 287-288). Subsequently the Companies withdrew their tender of \$8,409.39, and averred that \$5,400 was the full amount due and owing (R. 225). Thereupon, the Board, in accordance with its usual compliance procedures, examined the payrolls and records of the Companies to verify the accuracy of the Companies' computations and to ascertain whether the affirmative provisions of the order had been fully executed (R. 225-226, 287). During the course of its compliance investigation, the Board became convinced that the provisions of its order relating to back pay contained certain errors and mistakes, and that in framing such provisions it had misconceived the facts as to the availability of employment with the Companies, both prior to and since the hearing, for the 209 employees (R. 216-217). The Board and the Unions each filed petitions in the court below requesting a remand to the Board of so much of the proceedings as was necessary to permit the Board to reconsider its back-

pay remedy (R. 215-230, 231-280, 329-342).¹ The facts upon the basis of which the remand was sought were as follows:

On May 8, 1935, a strike caused mines, mills, and smelters operated by the Companies to be closed down for a period of several weeks (R. 39-40). At the hearing before a trial examiner of the Board, evidence was introduced that after resumption of operations on or about June 12, 1935, and continuing after July 5, 1935, the effective date of the National Labor Relations Act, the Companies discriminatorily refused to rehire the 209 employees, also called the claimants (R. 45, 74-99, 130-131, 172-176). Defending against the charge of discrimination, the Companies introduced evidence to show that the number of workers employed by them was drastically reduced after July 5, 1935. The Companies' evidence showed that after operations were resumed, mines were sold, operations at other mines were suspended, and that a reorganization of production methods resulted in reduction in the size of crews, the abolition of specific jobs and, in general, a need for fewer employees (R. 10-18, 185-186). The Companies also contended that in restaffing

On August 9, 1943, the court below entered an order treating the Board's petition "as a request for leave to file a petition in the nature of a bill of review" and permitting it to be filed as such (R. 281). The petitioners' motion was filed pursuant to leave granted by the court May 17, 1944 (R. 326).

after the strike, they quickly eliminated new employees to make room for former employees who applied (R. 17-18), and that over ninety percent of those working after the strike had been regular employees before the strike (R. 9). The Trial Examiner recommended reinstatement of some of the claimants with back pay (R. 30). The Companies excepted to these recommendations, stating that as to each such claimant the recommendation "ignores * * * that there is no evidence that said person's former employment or any employment with the respondents or either of them was available on and after July 5, 1935"; that such claimant's former employment had "disappeared due to a change of operations" and was no longer available; and, further, that such recommendation "ignores the evidence of respondents' requirements and availability of work * * *" (R. 18-21, 219).

The Board found that although, as the Companies had urged, there had been a reduction of operations after the strike, the claimants had, on July 5, 1935, and at all times thereafter, been discriminatorily excluded as a class from such jobs as were available (R. 94, 98-99, 101, 132, 166). The Board determined that the claimants should be reinstated (R. 131). It pointed out in its decision that while in such situations it ordinarily required the employer to make whole each employee by paying him a sum equal to the wages he would have earned with the employer during

the period of discrimination less his net earnings elsewhere during the same period (R. 132), it would depart from the general form of remedy in this case because the number of jobs available for all employees on and after July 5, 1935, appeared to be insufficient to take care of all claimants and other old employees who applied for work (R. 94, 98, 132-133). Since all the employees were equally qualified for most positions, and no special skill or abilities ordinarily were necessary, the Board assumed that, in absence of discrimination, the claimants, upon resumption of operations, would have shared in employment opportunities proportionately with the other old employees who applied for work, hereinafter called reapplicants (R. 100, 101, 102, 132). However, the Board found it impossible to determine which specific claimants normally would have been rehired (R. 132-133). Turning "to the only solution that seems fair, workable, and calculated to serve the purposes for which it is intended," the Board directed that reimbursement to the claimants be effectuated pursuant to a special arithmetical formula which it thereupon devised (R. 133).

The Board prefaced its discussion of the back pay provisions of its order as follows (R. 132):

In cases where we have found that certain employees were discriminatorily discharged or refused reinstatement, we have ordinarily ordered the offending employer

to make them whole with back pay, this being an amount equal to what they would have earned with the employer from the date of the discrimination to the date of reinstatement pursuant to our order, less net earnings elsewhere during the same period. *The objective is, of course, to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. Our order in the present case is designed to achieve the same objective, but the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo.* Thus, there were approximately 1,100 employees working for the respondents on May 8, and by July 5, 1935, only approximately 600. Of the 500 not working then, some 350 are claimants in this case; and we have found discrimination as to about 200. We have found above that after July 5, 1935, a substantial number of additional men were put to work, but it is apparent from the record that the total pay roll fell a good deal short of the 1,100 figure obtaining before the strike. Thus we have the following situation: had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work, since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large

number of the claimants discriminated against would have returned, but here again, we cannot tell which ones. * * *

[Italics added].

In substance, the formula devised by the Board was as follows: The amount of "all wages" paid by the Companies "to all persons hired or reinstated" from and after July 5, 1935, until the date of compliance by the Companies with the reinstatement provisions of the Board's order should be computed as a lump sum (R. 133). Since it could not be assumed that the claimants alone would have received the available jobs had the Companies acted lawfully, the Board directed that only a proportionate amount of the wages constituting such lump sum should be allocated to the claimants (R. 133-134). This proportion was based upon the ratio which the claimants bore to the total number of claimants plus other prestrike employees seeking their jobs back on and after July 5, 1935. As a method of arriving at this governing proportion, the Board specified that a fraction be constructed, which should have for its numerator the number of claimants, and for its denominator the number of claimants plus other prestrike employees seeking their jobs back, on or after July 5, 1935, whether successfully or not, called reapplicants (R. 134). The Board directed that so much of the lump sum as was embraced by this fraction be apportioned among the claimants, after deducting from the distributive share

of each the sum, of his net earnings elsewhere (R. 134). Illustrating its purpose, the Board gave a hypothetical example in which the lump sum amounted to \$360,000, and there were 200 claimants and 100 reapplicants. Since presumably "two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully * * * two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against" (R. 134).

Neither the Board's order nor the decree of enforcement fixed the amount of back pay in dollars and cents; the determination of the exact sum was left to be made after the claim period would be closed by reinstatement of the employees.² Here the hearing closed April 29, 1938 (R. 27), and the period for which back pay was due under the Board's order and the court decree enforcing it did not close until August 23, 1941, when the period of discrimination was terminated by the Companies' offer of reinstatement to the 209 employees (R. 224, 287). In its investigation and analysis of the Companies' records begun immediately after the Companies' tender on or about May 1, 1942 (see p. 4, *supra*), and completed in October 1942, the Board discovered that the Companies at virtually all times after July 3, 1935, had jobs opening up in numbers equal to and at time in excess of the

² This is the usual practice, *infra*, pp. 29-32.

total number of claimants and reapplicants, and at virtually all times had such positions available for all claimants and all reapplicants (R. 224-226, 268-280, 287, 294-296, 301-302, 305-306). The Board concluded, therefore, that it had been led into error by the Companies' evidence and contentions that at no time after the strike had jobs been available for the full number of claimants and reapplicants (R. 216-223). The Board found that because of its misconception as to the employment situation, its prior back pay order was "grossly unsuited to the situation which has now been discovered actually to have existed prior to and since the hearing" (R. 217).

The Board's petition in the court below summarized the foregoing facts and requested the court to enter an appropriate order to permit the Board to reconsider the back-pay provisions of its remedy (R. 213-230). The petition advised the court below that, in the event of such a remand, "the Board will for the first time be in a position to consider and, pursuant to its statutory duty, will consider the actual facts in order to prescribe a remedy appropriate to the true conditions. The Board can then correct the gross inequity now discovered and adequately provide for the effectuation of the purposes of the Act and the protection of the public interest" (R. 229).

The formula which the Board devised because of its understanding with respect to curtailed em-

employment opportunities was also found to contain an obvious mistake which, while relatively harmless in the employment situation then understood by the Board, served to reduce back pay, in the light of the facts subsequently disclosed, to but a small fraction of the intended sum.³ The Board asked the court below to remand on the basis of the inapplicability of the formula as a whole, which included the footnote in which this mistake occurred; the mistake was specifically called to the court's attention by the Unions, the petitioners here (R. 336). In its memorandum filed in this

³ While a dispute exists between the parties as to how much back pay is due, assuming the Board's decision must be applied without correcting the mistake, there can be no doubt that the mistake reduces the back pay to less than one-fourth of the amount which the claimants would have received under the Board's usual back-pay remedy. According to the Board's calculations, based upon its investigations, the 209 claimants, under the Board's normal remedy of full back pay, would receive approximately \$800,000 in reimbursement for the net loss which they had sustained, after allowance for interim earnings elsewhere (R. 227-228). Apportionment among the 209 claimants of the sum of \$5,400, which the Companies claim is all that they are required to pay under the back-pay provisions of the Board's order, would afford the claimants recompense for less than three-fourths of one percent (.0075) of the loss which the Companies willfully caused them during its six-year period of refusal to comply with the Act (R. 228). The Board's computations of the amount which would be due if the mistake remains uncorrected, while not yet complete because of the prolixity of the elements involved and the time-consuming process which the mistake imposes, nevertheless indicate that the claimants will lose more than 75 percent of the amount which they would have earned had the Companies acted lawfully.

Court (p. 11) ~~the~~ Board admitted that the formula contains the mistake which the Unions set forth in their petition (pp. 10, 20-21), and that such mistake renders the formula wholly inaccurate as a measure for back pay. This mistake appears in footnote 185, which provides (R. 133):

If at any given time during this period [of discrimination] the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum.

Correctly worded so as to achieve the Board's stated objective, footnote 185 should read:

If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against *plus the number of old employees reapplying*, only the earnings of a number of such employees equal to the number of claimants discriminated against *plus the number of old employees reapplying* shall be counted in computing the lump sum.

The omission of the italicized words from the footnote causes the back-pay award to depart from the Board's expressed intention to make the claimants whole to the extent that employment opportunities for claimants and reapplicants would have

permitted their employment, had it not been for the discrimination. Instead of limiting the back pay provided for the claimants to the full amount of their loss as a group, or dispensing with the formula entirely during periods of full employment, the literal effect of the footnote is illogically to limit the lump sum to the earnings of 209 employees, this being the number of claimants. Yet this is not the lump sum which is divided among the 209 claimants; only the smaller amount which results from reducing the lump sum by applying the governing proportion is divided among the 209 claimants. If the formula were to be retained, the lump sum obviously should include the earnings of all employees reflected in the governing proportion. Consequently, the claimants, even where full employment was available, are limited to a small portion of their loss in wages.*

*The formula likewise illogically requires that in determining the net amount of back pay due, there be deducted from the pro rata gross share of each claimant as computed under the formula, the full amount of such claimant's net interim earnings (R. 134-135), whereas the theory upon which the formula was devised would warrant deduction only of a pro rata share of his net interim earnings. The formula is based on the assumption that, even though there had been no discrimination in rehiring, not all of the claimants would have been rehired, and because it was impossible to determine which would have been rehired, the formula provides that each should get a pro rata share of the amount of wages which would have gone to those who would have been reemployed. On the same assumption, the Companies should be entitled to credit only for the earnings of those who would have been rehired, and since it is impossible to determine

On November 16, 1943, on the record and on the admissions contained in the Companies' answer to the Board's petition, the Board moved that the court below enter a judgment permitting the Board to reconsider its remedy as requested in its petition (R. 293-304). On April 19, 1944, the court denied the Board's motion and dismissed its petition for remand (R. 307-312). The court treated the petition as "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence" the back-pay provisions of the prior decree entered by the court in enforcing the Board's order (R. 307). It stated that it was "not persuaded that the Board departed from the form of order by which it 'ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay'

those individuals, the amount of net earnings to be deducted should be pro-rated on the same basis. Failure to provide for such a pro rating of the earnings to be deducted means that while only part of the claimants are treated as having worked for the Companies insofar as their recovery of wages is concerned, they are all assumed to have been working when it comes to reducing the liability of the Companies for making them whole.

Also, since the number of claimants and reapplicants varies from week to week, the formula is ambiguous as to whether a single governing fraction, based on the average or on the maximum numbers of claimants and reapplicants, or successive governing fractions, based on the actual numbers, are to be constructed for the period of discrimination.

And, finally, the formula fails to define the "average earnings" referred to in the last sentence of footnote 185 (R. 133). For convenience's sake, a detailed discussion of this point appears in Appendix B, *infra*, pp. 63-65.

in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as [to] the composition of the staff of workmen" (R. 309). It therefore concluded that the back-pay provisions of the decree were not "obtained by misrepresentation or wrongful conduct of the companies" (R. 310). The court also stated that it was not convinced "that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 310-311).

The Unions' request for modification of the decree or remand, (R. 327-342), filed pursuant to leave (R. 326), and the Board's petition for rehearing, in which the Unions joined (R. 337), were denied on May 17, 1944 (R. 343).

SUMMARY OF ARGUMENT

I

The Board decision of October 27, 1939, included detailed findings as to the Companies' course of conduct which, as to the job discrimination pertinent here, ripened into unfair labor practices when the National Labor Relations Act became effective on July 5, 1935. Upon the basis of its findings of unfair labor practices, the

Board ordered the Companies to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action included the requirement that 209 striking employees be "made whole" by payment to them, following a formula prescribed by the Board, of the wages which they would have earned had it not been for the discrimination, minus deductions for sums representing their interim net earnings. Only paragraphs 2 (d) and 3 (b) of the Board order and court decree, containing provisions intended to make whole the victims of the unfair labor practices, are involved here.

Unlike the findings of unfair labor practices, which were based upon a complete record made at the hearing before the Trial Examiner, the Board's make whole remedy, like its reinstatement remedy, was necessarily based, in part, on assumption and hypothesis. Once the facts as to the unfair labor practices are established, it is not the Board's practice to make findings in the original proceeding concerning the detailed employment situation which has existed subsequent to the discrimination, and the Board did not do so in this case. It has been the Board's consistent view that such matters should properly be reserved to the compliance stage. As to availability of employment, bearing upon the remedy of reinstatement and back wages, a Board order customarily

speaks as of a date earlier than either the court decree or the entry of the order; it is of a provisional, continuing character which must be shaped to changing conditions. On the question of the availability of employment, the make whole remedy here spoke as of the date of the discrimination, in 1935.

The formula which the Board designed in the present case now appears, in the light of newly-disclosed evidence relating to availability of employment subsequent to the unfair labor practices, to be wholly although unintentionally inadequate. The Board resorted to a special formula in order to achieve its expressed intention to restore the situation as nearly as possible to that which would have existed in the case of the 209 employees had it not been for the Companies' unfair labor practices. The formula was used solely because of the Board's understanding that full employment did not exist for all 209 claimants and all other pre-strike employees reapplying on and after July 5, 1935. This is clear from the face of the Board decision, and is confirmed by the Board's treatment of the back pay problem in other cases. The make whole principle which the Board has consistently applied requires that the employer pay to the victims of discrimination a sum of money equal to that which they would have earned but for the unfair labor practice, less a sum representing the net earnings or equivalent of the employees during such period. Usually the employee so dis-

criminated against is readily identifiable, and the amount of the back wages due him can be computed by reference to him alone. Complicated problems may arise, however, where, interwoven with the evidence of discrimination, it appears that there is not in fact sufficient employment available for all of the persons in the group discriminated against. In the case of a union group it may often be impossible to tell which employees, or the order in which such employees, would be discharged, laid off, or reinstated. Even in such cases, nevertheless, the measure of the employer's liability remains constant: his liability is the sum which the union men would have earned but for the discrimination. In situations where the Board has resorted to a "lump sum" formula, the employees rather than the employer are affected by the use of a special remedy. As to them, each is not made whole on an individual basis, but the earnings of the number which, but for the discrimination, would have retained their jobs are distributed among the whole group in proportion to their individual rates of pay.

The present case, on the employment situation as then understood by the Board, presented the lump sum problem in an aggravated form. The framing of a proper formula presented difficulties of construction which inadvertently resulted in the mistake appearing in footnote 185. The obvious purpose of footnote 185 was to protect the Companies against payment to the 209 union men of sums of money during any given period in

excess of what their actual earnings would have been with the Companies—in other words, to avoid their being made more than “whole”. This purpose would have been achieved by limiting the earnings going into the lump sum to those of a number of employees equal to the 209 claimants plus other pre-strike employees applying for work on and after July 5, 1935. The error of the footnote consists in its placing the number of employees whose earnings are to go into the lump sum at the lower ceiling of 209. Thus, in a situation where the number of persons newly hired or reinstated after July 5, 1935, exceeds 209, and *a fortiori* in the situation of full employment which is now understood to have existed, the back pay formula is grossly inadequate and makes the group of the 209 union men far less than whole. The remedy as it now stands and the resulting injustices are solely the result of the Board’s misunderstanding of the employment situation, combined with the error in footnote 185.

II

In the light of the provisional nature of the back pay portions of the Board order and court decree, the court below was right insofar as it held that it retained jurisdiction over these provisions of the decree. In this respect the holding was in accord with *United States v. Swift*, 286 U. S. 106, and with the decisions of other circuit

courts of appeals under the National Labor Relations Act and the Federal Trade Commission Act. We believe, however, that the court below acted improperly in denying the Board leave to reconsider the appropriateness of the back pay provisions of the order and decree. The basic problem underlying the request to remand was whether, in the light of newly discovered evidence as to the actual employment situation between July 5, 1935, and the date of the offer of reinstatement, the "make whole" remedy devised by the Board on the basis of hypothesis and probability should be modified in order to effectuate the policies of the Act. The precise question presented to the court below was whether the Board should be given an opportunity to consider all the relevant factors for the purpose of proposing modification of the decree. The Board could bring to the consideration of these matters a background and experience which the court lacked. After hearing the parties and ascertaining the actual facts of the employment situation, the Board would be in a position to point out specifically the respects in which its former remedy failed to achieve the statutory objective, and to propose concrete modifications in the court's decree. Any modification proposed by the Board would have legal sanction only after approval by the court and inclusion within its decree. On the facts alleged in the petitions and on the showing made, we believe that

it was error for the court below to refuse to vacate paragraphs 2 (d) and 3 (b) of the decree and to remand this portion of the cause to the Board for further consideration.

Many additional considerations support this view. The National Labor Relations Act gives the Board broad authority with respect to its remedy, an authority which survives the entry of an enforcing decree by the reviewing court. This has been recognized by decisions of this Court and of the circuit courts of appeals. *United States v. Morgan*, 307 U. S. 183, and other decisions of this Court emphasize the necessity for "coordinated action" between court and administrative agency in effectuating the policies declared by Congress.

The manner in which the court below disposed of the Board's and Unions' petitions evidenced a misconception of the proper rôle of the Board in situations of this character. The court misconstrued the purpose of the Board in devising the original make whole remedy. In effect, the court reversed the relationship between itself and the Board in the matter of remedy, and attributed to the Board a novel and erroneous theory of "divided damages" which is inconsistent not only with the Board's expressed purpose in the present case but also with the make whole principle which the Board has consistently followed in other cases.

ARGUMENT

IN THE CIRCUMSTANCES OF THIS CASE THE COURT BELOW ERRED IN DENYING THE BOARD LEAVE TO RECONSIDER THE APPROPRIATENESS OF THE BACK-PAY PROVISIONS OF THE ORDER AND DECREE

I

The issues now before this Court will emerge more clearly, we believe, if the remedial provisions of the Board's order, and the court decree enforcing it, are fully analyzed. The Board decision of October 27, 1939 was based upon evidence adduced at a hearing before a Trial Examiner at Joplin, Missouri, from December 6, 1937, to April 29, 1938. The Board found a course of conduct on the part of the Companies which, as to the job discrimination here involved, ripened into unfair labor practices when the National Labor Relations Act became effective, on July 5, 1935. The decision of the Circuit Court of Appeals, issued May 21, 1941, affirmed all material findings of the Board as to the unfair labor practices, and no application for certiorari was made by any party. Neither the Board nor petitioners have sought to reopen any part of the cause relating to the unfair labor practices found to have been committed, to adduce additional evidence or secure the making of additional findings of unfair labor practices within the scope of the original complaint or otherwise, or to substitute any new or different theory of law as to the

unfair labor practices from that underlying and expressed in the Board and court decisions.

Upon the basis of the unfair labor practices found by the Board, and subsequently affirmed by the court, the Board devised and the court approved certain remedial action. Negatively, the Companies were required to cease and desist from their unfair labor practices, both in general terms and in certain detailed respects; affirmatively, the Companies were required to take action which included the reinstatement and making whole of the group of employees against whom discrimination had been practiced. The men were subsequently reinstated on August 23, 1941, and, for present purposes, it may be assumed that the other affirmative remedial requirements have been satisfied, apart from those requiring that the employees be made whole. As to the latter, however, the Companies have not yet settled their accounts with the 209 men; no payments have yet been made. The petitions for remand relate solely to paragraphs 2 (d) and 3 (b) of the Board order and court decree, which contain the "make whole" provisions. The Board did not seek to visit findings of new unfair labor practices upon the Companies, but only to remedy unfair labor practices long since determined to have been committed. It sought from the court below only an opportunity to consider, in the light of such new facts regarding the employment situation as might be developed at a hearing, whether the back

pay remedy previously chosen was ill-adapted to achieve the Board's expressed intention of making whole the victims of the Companies' unfair labor practices.

Unlike the findings of unfair labor practices, which were based upon a lengthy record containing a complete picture of the facts, the reinstatement and back pay remedies devised by the Board and affirmed by the court below were of necessity shaped in the light of assumption and probability. As the Circuit Court of Appeals for the Second Circuit said, speaking of a somewhat similar situation, "In thus striving to restore the status quo, the Board was forced to use hypothesis and assumption instead of proven fact." *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 663. The Companies could properly be required to reinstate the group of 209 striking employees, who, as the unfair labor practice findings showed, had been discriminatorily denied consideration for jobs which were actually available on and after July 5, 1935—but the whole 209 could be reinstated only to the extent that sufficient jobs actually came into existence to take them back on a non-discriminatory basis in company with other old employees reapplying. The Companies were obliged to reinstate the 209 men to positions available on a non-discriminatory basis but were not obliged to purchase new mines or enter a new business for this purpose. See,

e. g., *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100, 106; *National Labor Relations Board v. New York Merchandise Co., Inc.*, 134 F. (2d) 949 (C. C. A. 2). The Board might perhaps have undertaken to make detailed findings as to the number of jobs available for the claimants at all times from July 5, 1935, to April 29, 1938, the day the hearing closed. But following its usual practice, the Board did not do so; and even if it had done so, this would not have provided sufficient data to have determined the employment situation at the date of compliance and thus irrevocably to have fixed the Companies' obligation under the Board order and court decree. In view of the Companies' claim that the employment level was continuously reduced after July 5, 1935, the Board, without attempting to make findings which could not have fully answered the question in any event, sought to frame its remedy of reinstatement so as to require the Companies to discharge their full obligation of reinstatement but not to require them to go further. Accordingly, the Board's order, as enforced by the court below, provided that each Company should reinstate those of the 209 men who were its employees or, to the extent that positions were not available, should place them upon a preferential list. (Sections 2 (c) and 3 (a) of the Board order and court decree; R. 168-169, 170-171, 210, 211.)

The same considerations applied to the make whole requirement. The actual loss to each employee could be computed only after the reinstatement provision had been complied with, thus bringing to an end the back-pay period. Here, as in the case of reinstatement, the Board followed its usual practice and did not attempt to make findings as to the actual losses suffered as a result of the Companies' violation of the Act. Since it appeared from the evidence relating to the unfair labor practices in 1935 that the level of employment was reduced after July 5, 1935, and since the Companies at all times contended that this situation had continued, and since, moreover, it seemed impossible to determine the order in which the 209 men would have been returned to work, had it not been for the discrimination, the Board sought to construct a remedy which to the fullest possible extent would conform to the make whole principle.

In short, the Board decision did not look to the employment situation subsequent to the period during which the Companies' course of discrimination was set, in 1935. So far as the availability of employment for the claimants was concerned, bearing upon the remedy of reinstatement and back wages, the Board order spoke as of 1935.

The portion of the decision which treated the Companies' discriminatory refusal to reinstate the 209 strikers, in violation of Section 8 (3) of the

Act (R. 74-117, 165-166), included findings, not disputed, that the pre-strike level of employment had not been reached on July 5, 1935, and that between then and November 1, 1935, several hundred additional jobs were filled (R. 94). On this basis, the Board concluded that "on and after July 5, 1935," the Companies "had jobs available at least to the extent indicated by the above figures" (R. 94). Unlike the case of a discharge from existing employment, this reference to the employment situation subsequent to the effective date of the discrimination, coupled with the findings that the strike remained current on July 5, 1935, and the strikers thus retained their status as employees (R. 94-96), that they were available for work (R. 96-98), and that absent discrimination they would have shared the jobs opening up with the other old employees (R. 98-99) went to the establishment of the unfair labor practices in violation of Section 8 (3) (R. 99, 166). See the opinion of the court below in enforcing the Board order, R. 189, 190, 197, 198-199, 203-207. However, the Board did not go further and make findings, or regard as in issue, the number of strikers which could in fact be reinstated or the wage loss of the group, during any period of time, even to the date of the hearing before the Trial Examiner. The Board did consider and determine the status of certain categories of employees who for various additional reasons the Companies asserted they had not "discriminated against" (R. 99) or should

not be required to reinstate (R. 99-117). But even these findings, except in the cases of a few individuals. (R. 109, 111-117); did not touch upon events occurring after 1935, and none was directed to the question of job availability after 1935.

Similarly, in discussing the remedy (R. 129-165); the Board made no findings as to the Companies' employment situation after 1935 but referred only to its findings made in connection with the unfair labor practices (R. 132). Although ordering that in any event they should be reinstated (R. 131), the Board did make findings as to whether certain individuals had obtained other "regular and substantially equivalent employment," (R. 136-165), but only because, until this Court settled the question in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 189-197, the argument was pressed that the obtaining of such employment terminated the Board's reinstatement power. (It may be noted that since the *Phelps Dodge* case, and the Board's considered treatment of the bearing of equivalent employment upon reinstatement in *Matter of Ford Motor Company*, 31 N. L. R. B. 994, 1099-1100, evidence is no longer taken, and findings are no longer made by the Board, even as to this aspect of compliance. See *National Labor Relations Board v. Regal Knitwear Co.*, 140 F. (2d) 746 (C. C. A. 2), certiorari denied as to this point, October 9, 1944.)

The Board's treatment of the instant case accorded with its general practice.³ This practice of not adducing evidence as to the amount of back pay due (see its *Fifth Annual Report*, Government Printing Office, 1941, p. 128) or other matters relating to the remedy in unfair labor practice hearings, or otherwise prior to Board order and court decree, has been noted by the courts, including the court below. *National Labor Relations Board v. New York Merchandise Co., Inc.*, 134 F. (2d) 949, 951-953 (C. C. A. 2); *Marlin-Rockwell Corp. v. National Labor Relations Board*, 133 F. (2d) 258, 261 (C. C. A. 2); *Corning Glass Works v. National Labor Relations Board*, 118 F. (2d) 625, 630 (C. C. A. 2); *National Labor Relations Board v. Brashear Freight Lines, Inc.*, 127 F. (2d) 198, 199 (C. C. A. 8); *National Labor Relations Board v. Newberry Lumber Co.*, 123 F. (2d) 831, 839 (C. C. A. 6); *National Labor Relations Board v. Fashion Piece Dye Works, Inc.*, 109 F. (2d) 304, 305-306 (C. C. A. 3); *Mooresville Cotton Mills v. National Labor Relations Board*, 97 F. (2d) 959, 963 (C. C. A. 4); *Agwilines, Inc. v. National Labor Relations Board*, 87 F. (2d) 146, 148 note, 155 (C. C. A. 5). The flexible, continuing nature of reinstatement and

³ At an early period the Board sometimes made findings as to earnings to the date of the hearing, but the pointlessness of doing this (*Matter of Mackay Radio & Telegraph Co.*, 1 NLRB 201, 200-213, 222-224, 235-2 (b), affirmed 304 U. S. 333, 348) led to a consistent practice to the contrary.

back pay orders has led the Circuit Court of Appeals for the Second Circuit to the view, expressed in the *New York Merchandise* case, *supra*, that they are to be interpreted as meaning no more than that reinstatement and back pay constitute "a remedy appropriate to restore the situation to that which the law demands" (134 F. (2d) at p. 952); that they are "interlocutory", rather than peremptory in the sense that they will support a proceeding to punish for contempt (p. 952)*; and that it is the duty of the Board "as an original tribunal and not as the surrogate of the court" (p. 952), following entry of a decree of reinstatement and back wages in the general terms of the Board's order, to resolve all questions relating to reinstatement, to compute the back wages due, and thereafter to have appropriate, specific requirements incorporated in the court's decree (pp. 952-953). This practice was deemed consonant with that directed by the Court in the *Phelps Dodge* case, 313 U. S. 177 (134 F. (2d) at p. 952). Similarly, the Circuit Court of Appeals for the Second Circuit has recognized that the Board's reinstatement and back pay orders do not speak as of the date of the court decree or of their issuance by the Board. In *National Labor*

* We cannot agree that such orders will not support contempt where, at least, there is lacking even a fairly arguable defense to reinstatement or where the employer refuses even to attempt in good faith to compute back wages. Subsequent proceedings in the Second Circuit indicate that contempt will lie in the situations just described.

Relations Board v. Acme Air Appliance Co., 117 F. (2d) 417, 421 (C. C. A. 2), the court said that the Board's order "speaks as of the time of the hearing and is founded upon the record before the Board." And in a subsequent proceeding in connection with the *Corning Glass* case, *supra*, reported at 129 F. (2d) 967, that court, again referring to an employer's defense to a back pay award, cited *United States v. Swift*, 286 U. S. 106, 114, 115, and held that "the continuing nature of a back-pay order may call for adjustment because of new facts which have occurred after the conclusion of the Board's hearing which led to the entry by the Board of such an order" (129 F. (2d) at p. 972).

Even though the Board's back pay, or "make whole", orders require money payments, no analogy can be made to common law money judgments. The remedial provisions of Board orders are based upon statutory proceedings "unknown to the common law". *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48. The make whole remedy in the aspect here involved,

As we have stated (*supra*, pp. 17-18, 27-28), in the present case, as well as generally, we believe that the Board order speaks as of the date of discrimination rather than even the later date of the hearing. The court was probably right in the *Air Appliance* case, however, since it there referred to the employer's possible defenses to the reinstatement and back-pay provisions which, to the extent they then existed, would presumably have been interposed at the hearing. Cf. *Marshall Field & Co. v. National Labor Relations Board*, 318 U. S. 253.

like other Board back pay awards made prior to agreement upon or determination of the specific amount due in dollars and cents, is thus of a provisional and continuing nature which must be shaped to events occurring subsequent to the time as of which it speaks; here the date of the discrimination is 1935. In *United States v. Swift*, 286 U. S. 106, this Court distinguished between types of provisions appearing in equity decrees, some of which are not subject to subsequent modification, and others of which may be shaped to later events. If an analogy to equity decrees be sought, the make whole provisions involved here can hardly be characterized as "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change"; they fall rather within the category of orders which "involve the supervision of changing conduct or conditions and are thus provisional and tentative" (286 U. S. at 114).

In the light of the employment condition which it now appears has existed at substantially all times since July 5, 1935, the formula which the Board devised in the present case in order to make whole the 209 employees is utterly although unintentionally inadequate to effectuate the policies of the Act.

Beginning with the first case decided by the National Labor Relations Board, on December 7, 1935, the "make whole" principle has consistently

been followed.⁸ Although the back-pay order has been patterned to fit the circumstances of particular cases, the guiding principle has always been to make the employees whole by restoring their earnings as nearly as possible to that which they would have received but for the illegal discrimination. True, the Board has under special circumstances altogether denied back pay to employees for varying periods of time.⁹ For periods during which the Board awards back pay, nevertheless, the make whole principle has been followed. This means that the employer is required to pay out a sum of money during the relevant period equal to that which he would have paid the

⁸ The first case was *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1, 51, enforced, *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. In *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 500, the formal language as to back pay contained in the *Pennsylvania Greyhound* order was changed in some respects, but the basic concept of "make whole" was retained. The formula set forth in the *Crossett Lumber* case has since been followed. See *National Labor Relations Board, First Annual Report* (1936), p. 128; *Second Annual Report* (1937), p. 148; *Third Annual Report* (1939), p. 201; *Fourth Annual Report* (1940), p. 99; *Fifth Annual Report* (1941), p. 74; *Sixth Annual Report* (1942), p. 75; *Seventh Annual Report* (1943), p. 52; *Eighth Annual Report* (1944), p. 40.

⁹ This Court has noted (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 198-199 n) that the Board does not invariably award back pay. Thus, the Board does not award back pay during the period of a strike even where the strike is caused by an unfair labor practice (*Matter of Sunshine Hosiery Mills*, 1 N. L. R. B. 664; *Matter of Lightner Publishing Corp.*, 12 N. L. R. B. 1255); if there is unjustified delay in filing charges before the Board, a deduc-

victim of discrimination if there had been no discharge, lay off, refusal to reinstate, etc., minus a sum representing the net earnings or equivalent of the individual during such period. The individual so discriminated against customarily receives this payment, and is thus made "whole".

Since early in its history the Board has been faced with many complicated situations, such as where, interwoven with the evidence of discrimination, it appeared there was not in fact sufficient employment available for all of the employees

tion is made for the period of the delay (*Matter of Inland Lime & Stone Co.*, 8 N. L. R. B. 944; *Matter of American Creosoting Co., Inc.*, 46 N. L. R. B. 240; cf. *Matter of Crowe Coal Co.*, 9 N. L. R. B. 1149); a deduction is likewise made when a case is reopened after having been closed or withdrawn (*Matter of C. G. Conn, Ltd.*, 10 N. L. R. B. 498; *Matter of Whiterock Quarries, Inc.*, 5 N. L. R. B. 601); if the trial examiner rules in favor of the employer and the Board reverses the ruling, no back pay is ordered for the period when the examiner's ruling stood unreversed (*Matter of E. R. Haffelfinger Co.*, 1 N. L. R. B. 760; *Matter of Kentucky Firebrick Co.*, 3 N. L. R. B. 455; see R. 135); the Board has refused to order back pay where discriminatory discharges were made with honest belief that they were required by an invalid closed-shop contract (*Matter of McKesson & Robbins, Inc.*, 19 N. L. R. B. 778; cf. *Matter of M. and M. Wood Working Co.*, 6 N. L. R. B. 372); and back pay is not awarded for any period during which the worker would not have worked in the absence of discrimination (*Matter of Ray Nichols, Inc.*, 15 N. L. R. B. 846 (plant closed because of business conditions); *Matter of Weiss & Geller, New York, Inc.*, 51 N. L. R. B. 796 (three-month period excluded for childbirth); *Matter of Atlas Mills, Inc.*, 3 N. L. R. B. 10; and *National Labor Relations Board v. Planters Mfg. Co., Inc.*, 106 F. (2d) 524 (C. C. A. 4) (seasonal employees).

marked by the employer for discriminatory treatment. In those cases in which it is clear which employees would have been retained or reinstated had it not been for the discrimination, there is, of course, no serious administrative problem, since the Board can follow its general practice of ordering reinstatement and back pay for the employees who would normally have been so retained or reinstated. It has been necessary, however, for the Board to devise special remedies in those cases in which it is difficult or impossible to ascertain which employees would have been retained or reinstated in the absence of discrimination. In those cases in which it was feasible to use seniority as the basis upon which to determine which employees should have had the jobs, the Board has ordered the employer to reinstate its employees upon such basis and to make whole only such of the employees as receive reinstatement.¹⁰ When, however, the Board can find no satisfactory basis upon which to determine which employees would have been retained or reinstated

¹⁰ *Matter of Timken Silent Automatic Co.*, 1 N. L. R. B. 335; *Matter of Segall-Maigen, Inc.*, 1 N. L. R. B. 749; cf. *Matter of Canas Glove Mfg. Works, Inc.*, 1 N. L. R. B. 519. See also *Matter of Acme Air Appliance Co., Inc.*, 10 N. L. R. B. 1385, 1404-1406, enforced as modified and remanded in part, *National Labor Relations Board v. Acme Air Appliance Co., Inc.*, 117 F. (2d) 417 (C. C. A. 2) (modification and remand on another point) (back pay determined on the basis of the order of reinstatement, even though reinstatement not upon the basis of seniority).

in the absence of discrimination, it generally determines that it is impracticable or impossible to make whole the employees on an individual basis and that it must, therefore, order the employer to make whole as a group all of the employees who have been discriminated against.¹¹ It makes the group whole by means of a "lump sum" formula, i. e., by ordering paid to the group the sum of money which those unidentifiable members of the group who would have had the jobs would have earned but for the discrimination. The sum thus due to the group is divided among all individual members of the group, each receiving a share in proportion to his average annual earnings. There is then deducted from the share of each individual appropriate net earnings during the period involved. This "lump sum" formula has been used by the Board, irrespective of the type of discrimination involved, in cases in which there was less than full employment available during or immediately after the program of discrimination and there was no satisfactory basis upon which to

¹¹ "The plan envisions the men [discriminated against] * * * to constitute an unjustly treated group, and therefore as a group entitled to the composite of wages paid to the group which replaced it. Thus it arrives at restoration of the status quo as near as may be, under the circumstances." *National Labor Relations Board v. American Creosoting Co., Inc.*, 139 F. (2d) 193, 197 (C. C. A. 6), certiorari denied, 321 U. S. 797, modifying 46 N. L. R. B. 240, 254-255, 257-258, and adopting the "lump sum" formula recommended by the Trial Examiner.

determine which employees would normally have been retained or reinstated.¹²

¹² *Matter of Jefferson Lake Oil Co., Inc.*, 16 N. L. R. B. 355, 402-404 (discharges); *Matter of Theurer Wagon Works, Inc.*, 18 N. L. R. B. 837, 873-875 (refusal to reinstate strikers); *Matter of F. W. Woolworth Co.*, 25 N. L. R. B. 1362, 1379-1383, enforced as modified, *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 662-663 (C. C. A. 2) (modification on another point) (lay-offs); *Matter of Ford Motor Co.*, 29 N. L. R. B. 873, 911-914 (lay-offs); *Matter of Ford Motor Co.*, 31 N. L. R. B. 994, 1098-1104 (discharges).

The "lump sum" formula has also been used in other situations in which it was impracticable or impossible to make whole the individual employees discriminated against even though full employment was available. *Matter of Samuel Youlin*, 22 N. L. R. B. 879, 894-895 (discriminatory allotment of work after a strike); *Matter of Acme Air Appliance Co., Inc.*, 10 N. L. R. B. 1385, 1404-1406, enforced as modified and remanded in part, *National Labor Relations Board v. Acme Air Appliance Co., Inc.*, 117 F. (2d) 417 (C. C. A. 2) (modification and remand on another point) (refusal to reinstate strikers, where there was no satisfactory method of determining in what order the strikers should have been reinstated).

Subsequently, when experience with these lump sum formulas disclosed difficulties not theretofore envisioned, the Board began to veer away from such formulas and revert to the usual type of back pay order, in the anticipation that an appropriate mode of determining losses would be evolved at the compliance stage. Thus, in *Matter of American Creosoting Co., Inc.*, 46 N. L. R. B. 240, 254-255, 257-258, the Board instead of adopting the Trial Examiner's recommendation for a "lump sum" formula, issued its usual back pay order. However, the Circuit Court of Appeals modified the Board's order by reinstating the "lump sum" formula as recommended by the Trial Examiner. *National Labor Relations Board v. American Creosoting Co., Inc.*, 139 F. (2d) 193, 196-197 (C. C. A. 6), certiorari denied, 321 U. S. 797. See *Matter of E. H. Moore*, 40 N. L. R. B. 1058, 1091-1092.

For present purposes, it is most significant that the manifest purpose of the Board in using the "lump sum" formulas is not to modify or diminish the total liability of the employer: the gauge of his liability, as in the case of a single discharge, remains the sum which he would have actually paid to the employees but for the discrimination. Use of the "lump sum" formula affects only the employees; it does not enlarge the sum which the employer is required to pay. Since the individuals who would have been retained or reinstated, at all times or at any particular period, cannot be separated from the entire group of claimants, the make whole principle is in effect transferred to the group, and it is the latter as an entity which is in substance made whole.

The instant case, as understood by the Board at the time of its decision, presented the "lump sum" problem in its more complicated form, since here it appeared not only impossible to determine in what order the 209 union men would have been reinstated as among themselves, but in addition it was impossible for the Board on the basis of the evidence then before it to determine the number of jobs opening up and the proportion which would have gone to the union men as a group as compared with the other pre-strike employees reapplying for work on and after July 5, 1935. The formula as sketched by the Board (*supra*, pp. 7-10) contemplated two lump sums—first, the lump sum of all wages paid to employees hired or

reinstated on and after July 5, 1935, and second, the smaller lump sum (which is a fraction of the larger) representing the wages which would have been earned by the claimants. The stated purpose of the Board remained, however, that of restoring the situation as nearly as possible to that which would have existed but for the discrimination (R. 132). Nothing in the decision manifests a purpose on the part of the Board to depart from its uniform practice of gauging the employer's liability by the total sum he would have paid to the union men had it not been for the discrimination.

As shown in the Statement (*supra*, pp. 11-14), the formula works inequitably as soon as the level of employment of persons hired or reinstated on and after July 5, 1935, exceeds 209, the number of claimants. And it became evident, after entry of the decree of enforcement, that the level of employment of new and reinstated employees on and after July 5, 1935, was sufficient at substantially all times after that date to provide jobs both for all 209 union men and all other pre-strike employees reapplying. As applied to the facts as they now appear, the Board's remedy not only produces injustice but is utterly at war with the make whole principle which the Board has uniformly applied in other cases.

No suggestion can be made that the Board in the present case intentionally sought to prescribe something less than the full make whole remedy. Not only does no reason given in the decision sup-

port such a view, but the reason explicitly given by the Board as justification for use of the formula reflects an understanding of the employment situation which has now been shown erroneous (*supra*, pp. 6-10; R. 132).¹³ The supposed necessity of a formula carried in its wake innumerable hazards of construction, which culminated in the framing of footnote 185 (*supra*, pp. 12-14). But the very necessity which gave rise to the formula also served to conceal the significance of such errors until the true employment situation—and hence, paradoxically, the absence of any need for a formula, or at least the instant formula—was discovered. Footnote 185 was obviously inserted only to protect the Companies themselves against a liability in excess of what they would have been obligated to pay in the event of full employment. That the Board entertained not the remotest idea that controversy as to the back pay award would turn on the wording of this footnote is evident, too, from the place it occupies in the decision. And further evidence that the framing of the footnote involved inadvertent error is provided by two subsequent decisions in which, dealing with situations similar to that understood to exist in this case, the Board successfully provided back pay

¹³ In the case of two employees whom the Board found to have been discriminatorily discharged, the ordinary method of computing back pay was deemed applicable and was used (R. 133, n. 184). And see the Board's treatment of the remedy in *Matter of Jefferson Lake Oil Co., Inc.*, 16 N. L. R. B. 355, which was decided just three days prior to the instant case.

to the claimants up to, but not exceeding, the full amount of their loss.¹⁴

Simply as a matter of logical alternatives, in the light of the foregoing, the conclusion seems

¹⁴ *Matter of Ford Motor Co.*, 29 N. L. R. B. 873, 911-914, especially footnote 41, page 912; *Matter of Ford Motor Co.*, 31 N. L. R. B. 994, 1098-1104, especially footnote 219, page 1103.

The case history of *Matter of American Creosoting Co., Inc.*, 46 N. L. R. B. 240, is also pertinent. There the Board's order provided for payment of back pay, in the usual manner, to certain employees found to have been discriminated against. But the Circuit Court of Appeals for the Sixth Circuit modified the order (139 F. (2d) 193, certiorari denied, 321 U. S. 797) by prescribing that back pay be computed on the basis of the Trial Examiner's recommendation that "a lump sum" be established "consisting of all wages, salaries, or other earnings paid out by respondent since December 23, 1937, the date of the application for reinstatement, to employees who had been hired since October 4, 1937, up to the time the respondent complies with the recommendations, * * *, such lump sum to be divided among all the employees listed in schedule 'A,' and each of such employees to receive an amount proportionate to the wages paid him prior to the strike, computed from December 23, 1937, to the date of his reinstatement, or placement on a preferential list, less his net earnings during such period" (pp. 196-197). The formula so adopted by the court contained no provision comparable to a footnote 185, corrected or otherwise, and thus placed no ceiling on the number of new employees whose earnings were to go into the lump sum; a literal interpretation of the court's decree would have required distribution to the claimants, for periods varying from 13 months to 6 years, of all sums earned by all new employees, regardless of the number of such new employees working at any time during the back-pay period.

The Board's files show that investigation after the entry of the decree disclosed that for most of the back-pay period there was a larger number of "new" employees (i. e. em-

inescapable that either footnote 185 was consciously permitted to stand as it now reads, but if so that this was done on a wholly erroneous understanding of the true employment situation,¹⁸ or that enmeshed in the construction of footnote 185 there was an inadvertent error. Study of the decision has convinced the Board that the latter view is correct, and that solely through oversight the footnote failed properly to deal with the situation obtaining when more than 209 jobs became available on or after July 5, 1935. Failure to discover the consequences of this error in turn was, as we have suggested, undoubtedly due to the

employees hired after October 4, 1937) working than there were claimants entitled to back pay, and for some weeks almost twice as many of the former as the latter. Had the Board literally applied the court's decree, therefore, the claimants, instead of having been made whole for wages lost, would have received sums far in excess of their actual wage losses. Consequently, the Board, in computing back pay, limited the amount to be distributed to claimants for any one week to the earnings of a number of "new employees" equal to the number of claimants. The total of the lump sum, thus computed, and subjected to further deductions for interim earnings, amounted to approximately \$105,000. Had the Board insisted upon literal adherence to the court's formula, the lump sum would have been approximately \$155,000. Thus, where the formula contained a mistake almost precisely the converse of that here involved, the Board applied the remedy not in its literal terms but in keeping with the make whole principle and the evident intention of the court.

¹⁸ Cf. R. 222-223. It is to be remembered, as further evidencing inadvertent error in the construction of the footnote, that the Board decision itself found that between July 5, 1935, and November 1, 1935, some 269 jobs (864 less 595) had opened up (R. 94).

Board's misconception of the facts relating to available employment. In any event, the remedy as it now stands is wholly inadequate, and would frustrate rather than effectuate the Board's declared purpose of making whole the victims of the Companies' unfair labor practices. In addition, as has already been noted, (*supra*, pp. 14-15n) the formula contains other errors and ambiguities which can be corrected only upon reconsideration of the remedial provisions of the order.

II

In the light of the provisional character of the unexecuted back-pay portions of the Board order and court decree, the court below was right insofar as it held that it retained jurisdiction over these provisions of the decree (R. 311). Cf. *United States v. Swift & Co.*, 286 U. S. 106; *Corning Glass Works v. National Labor Relations Board*, 129 F. (2d) 967 (C. C. A. 2)¹⁸; *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. (2d) 757, 761-762 (C. C. A. 9); *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909 (C. C. A. 4); *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2); *Century Metalcraft Corp. v. Federal*

¹⁸ In the *Corning Glass* proceeding the Circuit Court of Appeals for the Second Circuit, at the instance of the employer, reopened the back-pay provision of a decree enforcing a Board order some 15 months after the entry of the decree by the court, and remanded that part of the cause to the Board for further action.

Trade Commission, 112 F. (2d) 443 (C. C. A. 7).

We submit, however, that the court erred in denying the Board an opportunity to consider whether, in the light of the discovery of its mistake and of new evidence as to the availability of employment after July 5, 1935, the back-pay provisions of the decree should be modified in order to effectuate the policies of the Act. The court's and the Board, acting within their respective spheres, are to be regarded as collaborators in the task of attaining the ends sought by Congress in enacting the National Labor Relations Act. The jurisdiction of the courts, no less than that of the Board, "must be exercised in light of the large objectives of the Act." Cf. *Hecht Co. v. Bowles*, 321 U. S. 321, 331. We believe that the action of the court below, in the circumstances of this case, is inconsistent with the general principles declared by this Court in *United States v. Morgan*, 307 U. S. 183, 191:

* * * in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those

words should be construed so as to attain that end through coordinated action.

The basic problem raised by the request to remand was whether the make-whole remedy devised by the Board on the basis of assumption and probability should be modified in the light of the actual facts as to the employment situation between July 5, 1935, and August 23, 1941 (the date of the offer of reinstatement). A collateral question interwoven with the Board's failure to devise an adequate remedy as of 1935 involved the Companies' repeated representations as to the employment situation existing subsequent to July 5 of that year. Plainly, the Board could bring to bear upon these matters a background, experience and expertise peculiarly possessed by it. After hearing the parties and ascertaining the facts relating to the employment situation, the Board would be in a position to point out specifically the respects in which its former remedy failed to achieve the statutory objective. If the Board then concluded that through misunderstanding and error the original remedy had fallen short of the Board's expressed remedial intent, it could consider the shortcomings of the remedy not as an abstract matter, but in terms of the handicaps which the erroneous award had imposed and would impose upon the restoration of organizational freedom in the Companies' mines. Upon the basis of such reconsideration, the Board would then be in a position to frame proposed modifications which

would serve to effectuate rather than thwart the basic purpose of the original remedy. See *Chrysler Corp. v. United States*, 316 U. S. 556, 562. In this case it is not only individual workmen who suffer from a failure to rectify the Board's error; the public interest sustains an injury which is more far reaching and lasting. Of course, any modifications proposed by the Board would become effective only after approval by the court and inclusion within its decree.

The Board is authorized to require such affirmative remedial action "as will effectuate the policies of this Act" (Section 10 (c)). Unfair labor practices having been found, the Board is given discretion to shape remedies best adapted to achieve the broad policies of the statute. The Court has frequently pointed out that the Board's judgment as to the appropriateness of a particular remedy should be accorded great weight. For example, in *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 600, the Court said, "The Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged." In *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194, it was observed, "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law onto the more spacious

domain of policy." Indeed, the court below in enforcing the original order in this case noted that the Board's back-pay remedy related only to the means to be employed in effectuating the Act's policies; of the "form and scope" of these means, the court held the Board to be the "sole judge". (R. 207).

Entry of a judicial decree of enforcement does not relieve the Board of responsibility for effectuating the public policy embodied in the National Labor Relations Act. The purpose of the Act is the protection of commerce from industrial strife by the prevention of unfair labor practices. The entire administrative and judicial procedure described in Section 10 is remedial in a prospective sense. The remedial function basically involves a judgment by the Board that if a particular course of conduct is undertaken by the employer, freedom of self-organization will be restored and impediments to the free flow of commerce removed. The rôle of the court is that of arming the Board's remedial requirements with legal sanction once it has ascertained that they fall within the Board's authority. The importance of prevention in the statutory scheme, the prospective operation of the Board-devised remedy, and the broad discretion entrusted to the Board in adapting remedy to policy, all warrant the view that when, after the entry of the decree, facts are discovered which serve to nullify the Board's conclusion that a particular remedy will effectuate the

policies of the Act, the appellate court, notwithstanding that it alone has jurisdiction to vacate or modify its decree, should not deny the Board leave to consider, in the light of such facts, whether modification of the decree is required in the public interest.¹⁷

The Board's continuing responsibility for effectuation of the policies of the Act may be illustrated by various types of cases. Thus, where the order of the Board and the enforcing decree entered by the circuit court of appeals require the employer to bargain with a particular labor organization as the exclusive representative of his employees, the Court has nevertheless assumed a continuing power on the part of the Board, under Section 9 of the Act, to hold new elections and to certify new bargaining representatives. *Inter-*

¹⁷ In *Wallace Corporation v. National Labor Relations Board*, Nos. 66-67, this Term, decided December 18, 1944, this Court observed:

Only recently we had occasion to note that the differences in origin and function between administrative bodies and courts "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Federal Communications Commission v. Broadcasting Co.*, 309 U. S. 134, 143. With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

national Ass'n. of Machinists v. National Labor Relations Board, 311 U. S. 72, 82-83; *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 705-706. In a somewhat analogous situation, the Circuit Court of Appeals for the Sixth Circuit has held that the entry of a decree does not serve to bring within the exclusive jurisdiction of the court subsequent unfair labor practices encompassed by the decree, but that the Board retains power under Section 10 to proceed to the usual administrative hearing and remedy. *Thompson Products v. National Labor Relations Board*, 133 F. (2d) 637. And see *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *Corning Glass Works v. National Labor Relation Board*, 129 F. (2d) 967 (C. C. A. 2); *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. (2d) 757, 761-762 (C. C. A. 9); *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909 (C. C. A. 4).

Under Section 10 (d) the Board may "upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." *In the Matter of National Labor Relations Board*, 304 U. S. 486. The express power so given the Board under Section 10 (d) expires when a transcript of the record is filed in the reviewing circuit court of appeals, and thereupon withdrawal or remand rests in the sound discretion of the court. *Ford Motor Co. v. National Labor Rela-*

tions Board, 305 U. S. 364. However, nothing in Section 10 (d), or in the further provision of Section 10 (e) and (f) that upon the filing of the transcript the court shall have jurisdiction of the proceeding, deals in explicit terms with the proper distribution of function as between court and Board, after entry of the decree, with respect to reshaping of the remedy to changed conditions. Certainly nothing in these statutory provisions or in the *Ford* case denies the special competence of an administrative agency such as the Board to deal with its remedial orders; they express a procedural requirement necessary to permit the court to dispose of the case before it without the intrusion at the same time of another tribunal. See *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909 (C. C. A. 4). Other provisions of Section 10 (e) and (f), including those empowering the court to grant applications for leave to adduce "additional evidence"¹⁸ and providing

¹⁸ The instant proceeding, of course, does not involve an application to adduce additional evidence (see *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 225-226; *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9; cf. *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100); remand to the Board is sought after entry of the enforcing decree to consider questions touching the remedy upon which, following the usual practice, evidence is not developed in Board hearings. Where remand to the Board has been ordered following entry of an enforcing decree, such action has not been taken under the power of the court to allow applications for leave to adduce additional evidence. *Corning Glass Works v. National Labor Relations Board*, 129 F. (2d) 967

that the jurisdiction of the court shall be "exclusive"¹⁸ and its judgment and decree "final", likewise bear upon the power of the reviewing court only for the period prior to entry of the enforcing decree. The term "final" means that the decree has binding force but obviously does not foreclose reconsideration of the decree in the light of changed conditions developing after the date as of which the Board order and court decree speak.²⁰

(C. C. A. 2). Moreover, it is to be noted that when "additional evidence" is warranted under Section 10 (e) and (f), it is the Board rather than the court which adduces it and which formulates the findings of fact based upon it.

¹⁹ As between circuit courts of appeal in which petitions for review or enforcement are filed, the court in which the transcript of the record is filed has exclusive jurisdiction to review and enforce the Board order. *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 83 F. (2d) 731 (C. C. A. 2); *Hicks v. National Labor Relations Board*, 100 F. (2d) 804 (C. C. A. 4).

²⁰ At the time the National Labor Relations Act was enacted, in 1935, the Federal Trade Commission Act, upon which the court review provisions of the Labor Act were based, had been construed to permit the enforcing court to modify its "final" decree in the light of changed conditions. *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2). This has also been held subsequent to 1935. *Century Metalcraft Corp. v. Federal Trade Commission*, 112 F. (2d) 443 (C. C. A. 7). As to the proper distribution of authority between court and Commission in this connection see the *American Chain & Cable* case, *infra*, pp. 53-54. The other cases cited, *supra*, p. 44, also establish, of course, the survival of power to modify a continuing order or decree which has become "final" in the same sense of having the full support of legal sanctions. The expression "final" as used in the National Labor Relations Act and in the Federal Trade Commission Act is to be contrasted with that term as

Nor do any of these provisions deny the Board participation in a reshaping of the remedy into a form which will effectuate the policies of the Act.

Support for our contention as to continuing responsibility of administrative agencies for the effectuation of the public interests entrusted to them is provided by the reasoning of the Circuit Court of Appeals for the Fourth Circuit in *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909. After that court had decreed enforcement of an order of the Federal Trade Commission (139 F. (2d) 622), the parties against whom the order was directed petitioned the Commission to stay enforcement of its order until after the present war. As additional relief they asked that the Commission join with them in requesting modification of the decree of enforcement. The Commission denied the motion, taking the position that neither the Commission nor the court had power to stay enforcement of the order at that stage of the proceedings. The petitioners then sought a writ of mandamus to compel the Commission to consider and decide petitioners' motion on its merits. The court granted the application, in order to require the Commission to "exercise the administrative power delegated to it by Congress" (142 F. (2d) at p.

applied to decisions, for example, of the Tax Court of the United States, which are not of a continuing character but which fix specific liability for stated tax years. See *R. Simpson & Co. v. Commissioner*, 321 U. S. 225.

912). It held that the power of a circuit court of appeals over administrative remedial orders "is appellate and revisory merely," and does not include any power to grant or withhold remedial relief after enforcement, a power "essentially administrative in character" (p. 911 and note).²¹ It held further that the court had no power to modify the decree where the Commission had not itself modified its order, "since the decree is based on the order, not on the conditions which called it forth", and stated that "to hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement" (p. 913). The court observed that "there is no danger that the decree of the Court

²¹ The Circuit Court of Appeals for the Fourth Circuit, in denying a stay of its decree enforcing an order of the Federal Trade Commission in an earlier case, stated that the determination of whether a stay should be granted "is more properly within the province of the Commission than the courts. We are of the opinion that we have no power to order any delay in the putting into effect of a lawful order of the Commission." *El Moro Cigar Co. v. Federal Trade Commission*, 107 F. (2d) 429, 432.

²² In contending that the court below erred in its disposition of the petitions to remand, we do not mean to imply that the court's misunderstanding of the case may not have been attributable, in part at least, to the failure of Board counsel to elucidate the difficult issues presented as completely as has been undertaken in this brief. Questions as to the proper relationship between courts and administrative agencies during the post-decree period represent, of course, a largely unpioneered field.

may be flouted by such modification" (p. 912); for any "action taken by the Commission would then be subject to review by the Court as in the case of other orders * * *" (p. 913).

Finally, the manner in which the court below treated the Board's and Union's petitions to remand further reveals a departure from the proper relations between court and administrative agency in collaborating to effectuate the policies declared by Congress.²² After the Board's petition for remand had been presented to the court below in February 1943 (R. 230), the court, in August 1943, permitted the filing of the petition, but treated it as a "petition in the nature of a bill of review" (R. 281). Its final decision in April of the following year characterized the Board's petition for remand as "a petition in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence" (R. 307). Dismissing the petition, the court stated (R. 310), "We are not convinced upon the showing in these proceedings that the parts of the order and decree attacked were obtained by misrepresentation or wrongful conduct of the Companies, or that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved." The petition of the Board for rehearing and the Unions' petition filed pursuant to leave granted, were denied without opinion (R. 326, 343).

The Board's order plainly showed that, solely in response to the plea of the employer of reduced employment, the Board departed from its normal back-pay remedy and adopted a special formula (R. 132-134, *supra*, pp. 9-11). The court below in denying the remand nevertheless held that "circumstances other than" job insufficiency required the adoption of the formula—although the court failed to particularize such other circumstances (R. 310). The court thus rejected the Board's stated reason for the Board's remedy. It has in effect reversed its own holding on enforcing the Board's order that remedy is an area in which the Board is the "sole judge" (R. 207).²³

²³ Similarly, the court's statement that in decreeing enforcement of the Board's order "The Judges were not in agreement on the fundamental question whether the Board could make any compensatory award to the group of 209 employees at all under the circumstances established" (R. 310) is contrary to the opinion handed down at the time of the enforcement decree and furthermore seems wholly irrelevant to the issue of the Board's power to reconsider. All three judges sustained the back-pay provisions as to the group of claimants generally but one judge believed that, of the 209, a small number of "striking employees who were not shown to have been willing to abandon the strike and to return to work prior to November 1, 1935" should have been excluded from both reinstatement and back pay, because "the absence of evidence to justify a finding that the loss of wages suffered by these members of the group was attributable to the unfair labor practice" made the order penal (R. 207). The majority sustained the Board's findings that the whole group of 209 employees were willing to return at all times after July 5, 1935, if the Companies would reemploy them without imposing the requirement that they join the company-sponsored union (R. 206).

The court also states (R. 310) that in its opinion enforcing the Board's order, "We could not find prejudice to the companies in the formula adopted by the Board * * *; and although it is apparent on the face of it that it does not accord to each individual in the group an amount of back pay equal to a full wage from July 5, 1935, to the date of the offer of reinstatement, and that it specifically provides a fraction only of such full wage, we held that the Board was within its rights in requiring payment of a fraction of such wage prescribed in the formula." But the Board did not intend to limit the employees discriminated against to a fraction of their losses but to make them whole for all wages lost to whatever extent the perspective of job sufficiency might permit (R. 169, 171; *supra*, pp. 7-9). Moreover, in enforcing the Board's order the court shared the Board's assumption that, because of curtailed employment, the sum to be apportioned was the wages lost by the group (R. 203, 207), and did not understand that the apportionment was to be a mere fraction of the wages lost by the group. In now holding that its original decision awarded fractional reimbursement to the men because of circumstances other than the availability of employment, the court has not only departed from its own opinion but has substituted for the Board's reasons for its remedy, new and different reasons, and for the Board's intention to "make whole"

the group of employees a contrary intention to make them less than whole. In effect, the court has attributed to the Board a novel theory of "divided damages" under which the employer and the employees against whom he discriminated as a group mutually share the burdens of the employees' wage losses.

No doubt arguments will be pressed upon the Court to show the undesirable consequences of permitting the Board opportunity to reconsider its remedy. It must be assumed, and we believe this Court would be correct in so assuming, that only in a clear and meritorious case would the Board seek to reopen a remedy embodied in a decree of the reviewing court. The peculiar circumstances of the instant case, however, exercise a force so compelling as to defy *a priori* cataloging. The "make whole" remedy is uncomplished with; the Companies have not settled accounts which are now to be reopened. The purpose unambiguously stated in the Board's decision of making whole the victims of discrimination and of restoring the situation as nearly as possible to that which would have obtained but for the unfair labor practices (R. 132) has been defeated by a misunderstanding of the employment situation as it has in fact developed, by a serious mistake in the formula and by ambiguities not in the Board's stated purpose but in the detailed provisions it adopted to achieve such purpose. If more were needed, the Com-

panies' own representations as to the employment level existing after July 5 1935, unquestionably contributing as they did to the present difficulties, further reinforce the desirability of permitting the Board to reconsider the back-pay provisions. It is submitted that the failure of the court below to permit such reconsideration under the circumstances presented was so inappropriate as to call for revision of its exercise of authority.

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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JANUARY 1945.

APPENDIX A

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of

additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)..

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction.

to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

THE DISPUTE OVER COMPUTATION OF "AVERAGE EARNINGS" AS PROVIDED IN FOOTNOTE 185

The "average earnings" provision of footnote 185 is the basis of dispute between the parties which explains the wide discrepancy in the respective computations of the parties over the liability under the formula even without the correction (*supra*, p. 12). As shown (*supra*, p. 13), footnote 185 states that at any "given time" when the number of new or reinstated employees exceeds the number of claimants discriminated against, the amount to be credited to the lump sum shall be limited to the earnings of a number of such employees equal to the number of claimants discriminated against. The footnote then adds that "in such a case the respondents shall * * * take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum". The footnote does not expressly state that this process shall be followed separately for each given week in which the situation described in it exists. The computation supplied by the Companies indicates that the number of new or reinstated employees exceeded the number of claimants discriminated against during all but the first three of the 320 weeks of the discrimination period. The Companies, in making their computation, have construed the entire 317 weeks in which that situa-

tion existed as the one "given time" for which the average earnings of all new or reinstated employees shall be taken for the purpose of arriving at the amount to be included in the lump sum. They have taken the total of the wages earned by all new or reinstated employees working, no matter for how short a period, during the entire 317 weeks, and divided that total by the aggregate number of new or reinstated employees working at any time during that entire period. By this process of taking a single arithmetic average of earnings of all new or reinstated employees for the entire 317-week period, earnings of employees who worked merely one week and earned as little as \$14 or \$15 were averaged for a total period of over 6 years. Thereby, the Companies arrive at an average of earnings for all new or reinstated employees of the Mining & Smelting Company for the entire 317-week period, of \$1,796.49 (or about \$5.63 a week) and of the Lead Company of \$1,610.70 (or about \$5.05 a week). They have added to the sum allocated to the first three weeks this "average" multiplied by the number of claimants discriminated against. After reduction of this total by the governing fraction representing the ratio of claimants discriminated against to the total number of such claimants plus all old employees reapplying, the Companies, in each case, have arrived at a distributive lump sum which is then apportioned among the claimants individually. Each such share is, in turn, subject to reduction for interim earnings. This explains how the Companies have managed to compute the total net back pay due all the claimants for the entire 320-week period at about \$5400.

The Board's position, if the present formula stands, is that the average earnings of all new or reinstated employees should be taken separately for each week in which the situation envisioned by footnote 185 existed. However, because of the absence of an express statement to that effect, the different positions of the Board and the Companies portend further litigation over the interpretation of footnote 185. And, of course, even if the Board's position as to the amount due under the uncorrected formula is sustained, the employees discriminated against, as indicated (*supra*, p. 12, footnote 3), stand to receive less than 25 per cent of the actual wage losses sustained by them as a result of the discrimination.

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JAN 29 1945

Supreme Court of the United States

OCTOBER TERM, 1944.

INTERNATIONAL UNION OF MINE, MILL, AND
SMELTER WORKERS, LOCALS Nos. 15, 17, 107,
108 AND 111, AFFILIATED WITH THE CON-
GRESS OF INDUSTRIAL ORGANIZATION,

Petitioners,

VS.

No. 337.

EAGLE-PICHER MINING & SMELTING COM-
PANY, A CORPORATION, EAGLE-PICHER
LEAD COMPANY, A CORPORATION, AND NA-
TIONAL LABOR RELATIONS BOARD.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF ON BEHALF OF RESPONDENTS EAGLE-PICHER
MINING & SMELTING COMPANY, AND EAGLE-
PICHER LEAD COMPANY.**

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Supreme Court of the United States

OCTOBER TERM, 1944.

INTERNATIONAL UNION OF MINE, MILL, AND
SMELTER WORKERS, LOCALS Nos. 15, 17, 107,
108 AND 111, AFFILIATED, WITH THE CON-
GRESS OF INDUSTRIAL ORGANIZATION,

Petitioners,

VS.

EAGLE-PICHER MINING & SMELTING COM-
PANY, A CORPORATION, EAGLE-PICHER
LEAD COMPANY, A CORPORATION, AND NA-
TIONAL LABOR RELATIONS BOARD,

Respondents.

No. 337.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS EAGLE-PICHER
MINING & SMELTING COMPANY, AND EAGLE-
PICHER LEAD COMPANY.

A.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of
Appeals for the Eighth Circuit, sought to be reviewed,

is now officially reported (R. 307; 141 F. 2d 843). The incidental order of the Court denying petitioners' motion to modify or to remand was entered, in connection with the Board petition for rehearing, without opinion (R. 343). The opinion of the court below, enforcing at the instance of the National Labor Relations Board, the order of the latter, is also officially reported (R. 187; 119 F. 2d 903).

B.

JURISDICTION.

The jurisdiction of this Court is sought to be invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act. Such jurisdiction is lacking for the reasons hereafter appearing.

C.

STATUTE INVOLVED.

The statute of the United States allegedly involved is the following: National Labor Relations Act (29 U. S. C. A. Ch. 7, Sec. 151, *et seq.*; 49 Stat. 449).

D.

QUESTIONS PRESENTED.

The purported questions presented, although, as respondents contend, they were not presented below or involved in that decision, are without substantial support in the record, are novel here, and hence are not reviewable, are thus phrased by petitioners:

"1. Does the authority of the National Labor Relations Board to make all findings of fact and to determine the means whereby the effects of prior unfair labor practices are to be expunged terminate with the entry of a decree enforcing its order, so that thereafter, when the Board determines from facts appearing for the first time during its compliance investigations that the unexecuted provisions of the decree must be modified in order to achieve the relief intended, and so represents to the court in a petition to vacate and remand, the court may substitute its appraisal of the old and new evidence and of the effectiveness of the old decree for that of the Board?

"2. Does the existence of a verbal or mathematical mistake in the Board's formulation of the back pay remedy, embodied in the decree, warrant modification or remand of the back pay provisions of the decree so as to fulfill the Board's intent and purpose to 'make whole' the 209 workmen concerned?

"3. In making its order for restitution of future wages likely to be lost during the discrimination period following the close of the hearing before the Board's trial examiner, the Board was forced to prognosticate the employment situation which would exist after the hearing and to base such back pay provisions upon hypothesis instead of proven fact. Irrespective of any other consideration, did the court below act improperly in refusing to modify or to vacate and remand such back pay provisions when the facts as they materialized differed from those hypothesized by the Board?"

The issues of finality of judgment, and relinquishment by the court below of control over its own judicial processes to an administrative agency, are concealed behind these academic abstractions. They will be discussed hereafter.

STATEMENT OF THE CASE

Petitioners in this proceeding seek to review the ruling of the court below declining to vacate in part a final enforcement decree entered at their instance and by the procurement of the National Labor Relations Board. That court so ruled upon the ground that there was no sufficient factual basis to justify the action requested by petitioners. The labor controversy, which is the subject matter involved, had its origin in a strike of respondents' employees, as well as the employees of other mining operators, in the Tri-State area of Missouri, Kansas and Oklahoma, called by petitioners on May 8, 1935. Charges were filed by petitioners with the National Labor Relations Board, and the latter filed its complaint on May 23, 1936. Hearings thereon began December 6, 1937, and concluded April 29, 1938. An intermediate report was filed on August 31, 1938 (Tr. 13339). A final order by the Board was filed on October 27, 1939. Respondents filed a petition for review on November 6, 1939, and the Board countered with a cross petition for enforcement (Chronology, Pet. Br. p. V). On May 21, 1941, an opinion was entered by the court below enforcing the Board order, and on June 27, 1941, a decree was filed pursuant thereto. That decree became a finality, and respondents proceeded to comply therewith. An extended audit was required under the remedial formula, relating to the back-wage award; this audit was conducted by respondents and a tender of the net amount due, after deduction of interim wages, was duly made. On February 4, 1943, the Board filed a petition in the court below to vacate the final decree in part, and to remand and vacate the process of the final decree to that administrative agency. After appro-

appropriately challenging the jurisdiction of the court, respondents, pursuant to order, joined issue by answer wherein, by leave granted, they joined pleas to the jurisdiction, motions to dismiss, demurrers, and defenses to the merits. Therein, by verified averments, the allegations of the Board petition were categorically denied (R. 281). The nature of the Board proceeding, and the ruling below, can best be demonstrated by quotation (141 F. 2d 843, l. c. 845):

"The National Labor Relations Board filed a petition in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2 (d) and 3 (b) of the final decree of this Court in this case dated and entered June 27, 1941, and to remand the subject matter of those paragraphs to the Board for further proceedings. The Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company have filed their answers to the Board's petition. The answer challenges this Court's jurisdiction and the sufficiency of the petition. The Board has now moved for judgment on the record and the pleadings, upon the grounds that no genuine issue of facts exists with respect to any material allegation of the petition and that the Board, as a matter of law, is entitled to the relief prayed for. The companies assert that the motion of the Board is without merit and should be denied and that the petition of the Board should be dismissed.

"We are not convinced upon the showing in these proceedings that the parts of the order and decree attacked were obtained by misrepresentation or wrongful conduct of the companies, or that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved.

"Our conclusion is that, while this Court has jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted, the petition of the Board and the record in this case present an insufficient factual basis for setting aside paragraphs 2 (d) and 3 (b) of the decree and for remanding the subject matter thereof to the Board. The motion of the Board for judgment upon its petition is therefore denied, and the petition is dismissed." (Italics ours).

It will be noted that the Board filed a motion for judgment upon the pleadings despite the categorical denials contained in respondents' verified answer. After the opinion below petitioners filed a motion to modify the decree or to remand, which is tantamount to the Board motion for judgment upon the pleadings since it sought such modification or remand upon the face of the record, without hearing or trial (R. 329). Both the Board petition for rehearing, and petitioners' motion to modify, were denied below on May 17, 1944 (R. 343). The Board took no further action, but petitioners have sought this review by certiorari.

A reference to the issues upon this review is essential to a clear understanding of the pertinence of the material facts to be stated. We do not understand that petitioners assail the factual conclusion reached by the court below, but assert that in venturing to determine that issue, although it was presented by the pleadings of the litigants, that court invaded the administrative province of the Board. Petitioners frankly seek this review upon the avowed premise that the doctrine of finality of judgment has no application to a judicial decree of enforcement procured by the National Labor Relations Board from a United States Circuit Court of Appeals. They ignore the doctrine that any judgment becomes final upon the end of the term; they ignore further the statutory pro-

vision that the judgment and decree of the Circuit Court of Appeals, upon a review or enforcement proceeding, "shall be final * * *." National Labor Relations Act, 29 U. S. C. A., Sec. 160, p. 239. They equally ignore the controlling provision of the same statute whereby, upon review or enforcement proceedings, the Board is deprived of jurisdiction and exclusive jurisdiction vested in the Circuit Court of Appeals. * Petitioners urge, however, that after the Board has been thus deprived of jurisdiction, after exclusive jurisdiction has been vested in the court, and after such a final decree, and compliance therewith by the employer,* the Board, at the instance of the interested Union, and the back-wage claimants, may (with or without judicial approval) vacate, modify, or rewrite the judicial decree, to render it more onerous upon the employer theretofore complying therewith, and to exact supplemental penalties from that employer, upon the mere ground that the original decree (enforced at the Board request, wherein the ~~complaining~~ union joined) was, upon reconsideration by the Board years later, insufficiently punitive "to effectuate the purposes of the Act," that the Circuit Court of Appeals, despite the finality of the decree, upon motion either of the Board or the interested Union and the back-wage claimants, must (eo instante, as a matter of law) acquiesce and either rewrite its final decree (after the term) as thus requested, or remand that decree to the Board for its modification thereof, thereby surrendering to an administrative agency all control over

* Respondents, before the proceeding below, complied, or attempted to comply, with the final decree. If their interpretation of the formula in the Board remedy is correct, they fully complied. If, however, the undisclosed Board interpretation (requiring the payment of approximately \$200,000 as a back-wage award) is correct, the Board can enforce the decree by proceedings for contempt. In either event the issue is identical, and the decree complied with or sought to be complied with is final.

the judicial process, and that the Union and the back-wage claimants may, upon certiorari, compel the court below thus to designate an administrative agency to reform, modify, nullify, or vacate that final judicial decree in the discretion of the latter. Under such a doctrine the Board would become all-controlling, and the court below would be without authority over its own judgments or decrees. Petitioners do not assert, or predicate alleged error on, any claim that either by pleadings or proof below they satisfied the exigent requisites of a bill of review (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 321 U. S. 238, 88 L. Ed. 936, 1. c. 942 and 948, n. 4). The most cursory scrutiny of the questions here presented (Pet. Br. p. 2) will confirm this assumption. The petitioners contend (*first question presented*) that the court below was bound *conclusively* by the representations of the Board, and of the Union and the back-wage claimants; that the facts were as stated in their pleadings and that the decree should be modified as requested, and could not judicially consider or determine the issue whether there was a factual or legal basis for the representations thus made (by which doctrine the Circuit Court of Appeals would surrender and abdicate from all judicial functions and divest itself of control over its own processes); secondly (*second question presented*) that the interested Union (for such was not the Board position below) may require, as a matter of law, without hearing or evidence, the modification of that final judicial decree, or a remand to the Board to accomplish the same objective, upon the sole ground that the original Board order enforced by the decree, was upon its face inadvertently erroneous, although that Union not only failed to pursue the statutory remedy to correct the error but joined with the Board in the procurement of the decree assailed; and thirdly (*third question presented*) that, be-

cause allegedly the Board created a remedy without factual basis therefor, over the opposition of the employer, thereafter, with the Union concurring and assisting; transmuting that remedy into a final enforcement decree, the Union should be permitted to disregard the decree in question and, insofar as it affected back-wage rights after its date, compel upon mere motion, without trial or hearing, its annulment. Comment is unnecessary if the judicial process is to be retained. It may be stated parenthetically that, although petitioners constantly speak of a change of employment conditions, with the inference that there was such a change after the close of the hearing below, the evidence is conclusively to the contrary. As demonstrated hereafter from the undisputed record, the employment facts adverted to by petitioners existed from 1935 onwards, and were fully known both to the Board and the enforcing court at the time of and prior to the decree. With full knowledge of the facts the then Board provided a given remedy, and procured enforcement thereof, against respondents' opposition, by the court below. Six years later the interested Union asks this court to nullify the decree which it joined in procuring, upon the ground that the successor Board, upon reconsideration, desires an opportunity to increase the penalty against the complying employer.

The Original Proceeding.*

The facts in the original hearing before the Trial Examiner are material only insofar as they pertain to

* Respondents opposed the filing of the printed record in this proceeding as manifestly inadequate. They reiterate their objections thereto (Brief in Opposition to Certiorari, p. 14 et seq.). Reference however to the printed record will be thus designated (e. g., R. 1). Reference to the typewritten transcript, unprinted, will be thus designated (e. g., Tr. 1).

the issue of alleged discrimination, i. e., the charge by the Board that respondents refused to reinstate the claimants on or after July 5, 1935, for discriminatory reasons, and insofar as they furnish the grounds for the Board action in contriving the remedy now sought to be vacated after its incorporation in a final judicial decree.**

The general background of the labor controversy involved is found in the lead and zinc industry in the so-called Tri-State area of Missouri, Kansas and Oklahoma. It is one of the great zinc producing localities of the world.

Respondents constitute two of the approximately fifty operators in the district. The charges involved in the original action were leveled against all operators. Eagle-Picher Mining and Smelting Company is a subsidiary of Eagle-Picher Lead Company. In the particular area involved Eagle-Picher Lead Company operated only the Joplin smelter. Eagle-Picher Mining and Smelting Company operated the various mines, the Central Mill and the Galena smelter. This was an area which had known many years of industrial peace. Throughout its extent, on the part of all operators, approximately 7,000 to 7,500 men were employed (Tr. 7412). Employment varied necessarily with the price of ore and the operation or non-operation of marginal mines. Since reference will be made hereafter to the irregularity of the employment of the claimants before the strike of May 8, 1935, some explanation of employment procedure is necessary. The mining and smelting of zinc and lead are hazardous enterprises, and as a result subject to stringent statutory regulations in Missouri, Oklahoma and Kansas. Opera-

**Petitioners, apparently for purposes of prejudice, have purported to recite facts irrelevant to the issue. Significantly record citations furnished are not to the transcript, but to the Board order or Board or Union pleadings. We refer the Court to the original opinion below, which directed enforcement of the Board order, for a review of these facts (R. 187; 119 F. 2d 903).

tors are constantly subjected to silicosis and lead-poisoning claims. As a result, long before the strike and admittedly not in anticipation thereof, the operators established an employment system to insure both the capacity and the personal character of their employees (Tr. 7227). The claimants were admittedly familiar therewith (Tr. 455, 679, 682, 825, 829, 1031, 1588, 1787, 1792, 2163, 2424, 2638, 4743, 5207, 5732, 5755). Personnel representatives were established to control the employment of men. Initial physical examinations were required; this was by statutory compulsion in two of the jurisdictions. Supervisory employees, other than the personnel officers, were deprived of the right to hire (Tr. 7227). A system was thereupon established wherein men, approved for employment by the personnel officers of the various operators, were issued "rustling" or "work" cards. Possessed of such a card, a condition precedent to employment, any man could obtain work at any mine or smelter where there was an existing vacancy. As a result the employment of the claimants by any particular operator was exceedingly irregular; a given worker, possessed of cards from several operators, might be employed at a great number of mines or smelters, and by many different operators, during a given year. This employment system is exceedingly material upon the issue of discrimination since the record shows that throughout 1935 no application for a "rustling" card by a former employee was ever rejected by the personnel officer of respondents (Tr. 6625, 6712, 7261, 7262).

The events leading up to the strike were these: At some time prior to 1935 the International Union determined to organize the employees of the Tri-State area. Conferences were held with operators (Tr. 131). The Board exhibits at the original hearing (Nos. 240, 241, 242) revealed that at the very time of this activity by union officials

there had developed a marked loss of interest on the part of members or former members of the International Union. On March 13, 1935, the Union demanded of all operators in the Tri-State area that the latter appoint a single committee to meet with a single committee of the International Union to bargain collectively for the entire district as a single bargaining unit. No conferences were sought with respondents or other operators. No complaint was ever made as to wages, hours or working conditions. The sole demand of the Union was that it be recognized as the exclusive bargaining agency for all employees in the district. The executives of the International Union determined upon a strike, to enforce this demand, and a secret strike vote was held upon three days notice (Tr. 64). That notice consisted only of posting in union halls, where the unemployed only would congregate; this is the testimony from union officials (Tr. 64). According to the Union testimony only approximately 600 men cast ballots on the issue of the strike, which was to deprive 1500 men of their employment (Tr. 64, 7412). Union officials testified that this minority vote stopped "every wheel turning" in every mine, mill and smelter in the Tri-State field (Tr. 111, 141, 2608). Without prior conferences or negotiations, respondents were suddenly notified by a union official at three o'clock in the afternoon that a strike had been declared effective at midnight that night (Tr. 51). It is conceded, the Board found, the court below held, that this strike was declared solely to compel recognition of the International Union as an exclusive bargaining agency, despite the fact that it did not represent a majority of the employees. The strike was directed against the district and not against any particular operator. It was designed to compel recognition of the Union by all operators irrespective of whether the International Union could boast a single member in the employ of any particular operator.

It was an organization drive, and International officials of the International Union were in attendance (Tr. 51, 2605). The circumstances are reviewed in the original opinion below (R. 191, 192).

The evidence overwhelmingly demonstrated that the International Union was a minority organization, that its claim to recognition for which the strike was declared was without any basis whatsoever, and that respondents were justified in refusing, and after July 5, 1935, compelled to refuse, to extend it recognition. The Board concedes this (Tr. 13342; R. 128). Thus the Board found (R. 128):

"The evidence fails to establish that the International on or after May 8, 1935, represented a majority of the respondents' employees in an appropriate unit. The evidence further shows that in the period in question, the International itself was unable to determine the precise extent of its own membership."

Thus it affirmatively appears beyond dispute that on or after July 5, 1935, the effective date of the National Labor Relations Act, respondents were prohibited by law from granting the recognition demanded by the Union as a condition to terminating the strike; the Union officials, however, persisted in the demand, and the illegal strike continued.

The record is convincing that this minority strike was intensely unpopular among workers of the district. Within a few days after its declaration back-to-work petitions were circulated. The operators had little incentive to attempt to break the strike. The price of ore was exceedingly low; mines were operating at a loss; overproduction had built up a surplus for the use of the smelters (Tr. 7264 et seq.). Whether the back-to-work movement was spontaneous, as asserted by respondents,

or inspired by operators, as asserted by the Board, is not material to the issues here. Responsibility for sporadic outbreaks of violence is equally irrelevant. It is suggestive, however, that the first organized violence was on the part of the International Union in assaulting a sheriff and his deputies (Tr. 394). The International Union paralyzed local law enforcement agencies, and the Governor of Oklahoma called out the National Guard (Tr. 2941). In the inter-union conflicts the International Union alone used firearms; the only dead were members of the Tri-State Union (Tr. 1962, 1963). The International Union marched as an army and besieged the Galena smelter of respondents; after a siege of approximately 36 hours, those within the smelter were rescued by the Kansas troops. The violence of the International Union is undisputed, and fully documented in the record (Tr. 2860 *et seq.*; 6500 *et seq.*; 4296, 6460, 6465, 6466, 6471, 6483, 6488, 6493, 6495, 6499; Resp. Exh. 67, 6488). During the course of these events respondents re-opened the mines and the Central Mill on June 12, 1935, and, as the Board found, had, with the exception of the Galena smelter, resumed normal operations by the middle of that month (R. 45). The Big John mine did not open until July 20, 1935, but it is not claimed that this delay was for other than purely economic reasons or that the strike or any shortage of labor had any connection therewith. The opening of the Galena smelter in the latter part of June was attended by the armed riot heretofore described. After the troops had put down the local disturbance, and relieved the siege, that smelter opened on July 16, 1935, and within a few days was in normal operation (Tr. 6627). The customary notice of re-opening was given by respondents and, in re-employment, former employees were given preference (Tr. 6670, 6826). No application of any former employee was rejected upon any ground (Tr. 7233, 7239, 7361). No strike-breakers were used.

It was the theory of the Board, throughout the hearing, that from and after the time of the strike, no man could obtain employment at Eagle-Picher unless he had a Blue Card (i. e., unless he was a member of the Tri-State Union, or subsequently, the Blue Card Union). Each of the claimants seeking reinstatement or back-wages accordingly testified that he "understood" that, at all times after the strike, it was necessary to have a Blue Card to obtain employment with respondents (e. g., Tr. 2546). The following is typical (Tr. 2546):

"Q. Was it your understanding after the strike in 1935 that it was necessary to have a Blue Card in order to go to work for Eagle-Picher Company?

Mr. Madden: Just a moment, now. I object to that as calling for a conclusion and not for a statement of fact, also as being a conclusion which under no circumstances could be binding upon the respondents. There is not any proof shown that any such understanding emanated from any act of the respondents.

Trial Examiner Ringer: Overruled."

The question of the competency of this "understanding" was strenuously argued before the Trial Examiner (e. g., Tr. 2113, 2114, 2115). The Trial Examiner did not admit the "understanding" as binding upon respondents or as tending to prove the truth of it (Tr. 2115). From a questionnaire circulated by the Board and petitioners among the claimants, this purported understanding was apparently derived from the daily press (Resp. Exhs. 22, 23, 25, 34, 39). No attempt was made by the Board to show that this claimed "understanding" was in any manner attributable to respondents. The fact is that the overwhelming majority of these claimants had never applied for work with respondents after the strike or otherwise sought re-employment. It is stipulated that they at all

times remained on strike in attempted enforcement of the illegal demand for recognition of the International Union (Tr. 3247, 3248, 3249, 3252, 3255, 3256, 3789, 3882). The Board found that the strike for this illegal condition of employment was still continuing at the time of the final order (Tr. 13385). Thus the proof disclosed that their unemployment resulted from their strike activities, and eventually even counsel for the Board conceded that membership in the competitive union was not a condition precedent to employment by respondents (Tr. 7398, 7400). The Trial Examiner further held that "in so filling its rolls of employees (following the strike) the respondents did not require membership in the Tri-State Union as a condition of starting such employment * * * (Tr. 13339)." Counsel for the Board at the hearing declared that any claimant who abandoned the strike and applied for reemployment would have been a "scab" (Tr. 3475). Since it is conceded, however, that the International Union did not represent a majority, it is unmistakable that on or after July 5, 1935, respondents could not have legally granted to the International Union the recognition demanded. The present claimants, therefore, were declined re-employment except upon the granting of an illegal condition.

The Board evidence negated the charge that respondents refused to reinstate the claimants upon discriminatory grounds, and to the contrary affirmatively disclosed that respondents offered full reinstatement. Thus on July 16, 1935, Potter, on behalf of respondents, conferred with various Union officials. These included the officers of all locals of the International Union (Tr. 2601). The proceedings at this conference were related both by a witness (Berry, International Union official) on behalf of the Board, and a witness (Campbell) on be-

half of petitioners. The occurrences at that conference are undisputed. This Union official testified (Tr. 2619):

"I will say this for Mr. Potter, that I don't believe that I have talked to a man who was fairer and more open. He treated us with all courtesy in the world and the meeting broke up in just as good spirits as it had met in and he invited us at any time to come back."

The invitation was never accepted. In response to a highly leading suggestion, from Board counsel that Potter was willing to confer with them as employees, but not as representatives of the Union, the witness replied (Tr. 2621):

"A. At that meeting he did not. He accepted the Committee at their word and talked to them. We know nothing about any—we were invited as a Committee representing the various locals. *We went and were accepted as such.*"

One of the Union representatives was Brown, President of the International Union, a national officer (Tr. 2605). In response to an inquiry from Potter as to the demands being made by the International Union, Brown replied (Tr. 2607):

"We * * * make the same demand *and just one*: that in consideration of the fact that our organization has enlisted in its membership a substantial majority of the employees in this District, *we are again demanding the right to act as sole collective bargaining agents for the employees.*"

Potter challenged the statement of majority representation and asserted, to the contrary, that his information revealed that the International Union had only a minority of the employees. *The Board held that Potter was right.* Potter, moreover, after originally pointing out in the con-

ference that all trouble might have been avoided if the International Union had conferred with him before the strike was declared (Tr. 2606), concluded the conference by proposing *that the International Union men return to work, build up their numerical strength, and then make their demand again on respondents* (Tr. 2618). It may be noted that Potter thereby not only proffered to, but urged upon, the striking members of the International Union their former employment; and as well, he not only did not object to International Union activities in organizing employees, but proposed such activities. The only response of the president of the International Union was that those terms were satisfactory if Potter would further agree in writing to "recognize them as * * * duly authorized collective bargaining agents" (Tr. 2619). Under the finding of the Board, that the International Union was a minority union, such recognition at that time by Potter, in writing or orally, would have violated the National Labor Relations Act. The Union representatives departed, and, although invited to return, did not do so.

Although the Board found that, *at that very time*, respondents were indulging in discrimination against the International Union and its members, this Union Committee made no such complaint. It is apparent from the entire context, moreover, that, throughout this conference, the International Union members were refusing, *and Potter was urging them*, to return to work. The Board nevertheless found, omitting all reference to this final and controlling conference, that the unemployment of members of the International Union, claimants in this proceeding, resulted from refusal (which never occurred) on the part of respondents to employ International Union members, and *not* to the continuance of the International Union strike in its attempt to obtain recognition. It is

a coincidence that Reid Robinson, successor to Brown, as President of the International Union, disapproved the strike in his Annual Report in 1937. In language reminiscent of Potter's (Tr. 6529):

"The situation in the Tri-State District is a serious one and has many ramifications. In my opinion, the strike was ill-advised. The strike should have been called off as soon as the Militia arrived upon the scene, *getting the men back to work and reorganizing so that they could be successful at some future date.*"

Thus Robinson not only recognized the merit of Potter's suggestion, but clearly recognized that the men could have returned to work had they so desired, *and that it was the strike and not discrimination which prevented them from so doing.*

The Board had charged that respondents had, on discriminatory grounds, refused to reinstate the 209 claimants on and after July 5, 1935. Respondents were contending that the constituent elements of any claimed discriminatory refusal to reinstate were these: (1) an employee willing to work; (2) an existing vacancy in the employment of the employer; (3) an application for employment; and (4) an illegal refusal by the employer to re-employ the applicant in the available vacancy upon discriminatory grounds. Respondents further asserted that not only did the proof fail to establish the discriminatory refusal to reinstate, charged, but affirmatively negated such alleged discrimination and disclosed that the unemployment of the claimants resulted from their unwillingness to work, absent the granting of the illegal condition of recognition, and their adherence to the strike policy of the Union. The Board, in formulating its final order finding discrimination against all claimants as of

July 5, 1935, was confronted by the following obstacles to a back-wage award: (a) that the claimants throughout the period in question were on strike, unwilling to work, and demanding the illegal recognition of the Union as an exclusive bargaining agency for all employees as a condition precedent to their return to their employment; (b) that on July 16, 1935, full reinstatement was offered them, and that offer was refused; (c) that the claimants were irregular workers* and that it would require an exceedingly violent presumption to declare that part time workers before the strike would have become full time workers after the strike; and (d) that the employment level following the strike never rose to the employment level prevailing before the strike, with the result that on July 5, 1935, the date when the Board found that discrimination began, there were only approximately 500 to 600 jobs available (even if no new men were hired) for the 1,100 pre-strike employees.** Faced with these difficulties the Board turned from fact to fiction, and created an artificial doctrine of discrimination, namely, that although on July 5, 1935, there were

*The record discloses that the average annual earnings of the claimants, before the strike earned in respondents' employ, was \$546.89. Appendix A of this brief lists the names of the claimants and the transcript citations as to pre-strike earnings. Hence, under any form of back-wage award, if pre-strike earnings were projected for the period from 1935 to 1941, and interim wages deducted, average earnings elsewhere of \$50 per month would more than offset any award made. Petitioners argue, however, that after deducting net earnings elsewhere, each claimant should have received roughly \$3,830 (Pet. Br. p. 17).

**Neither the Board nor petitioners contend that the post-strike employment level ever rose to the pre-strike employment level. It is conceded, in other words, that after July 5, 1935, jobs were fewer in number than previously. Thus Board counsel stated in their brief in the court below (p. 6, n. 5):

"The companies increased their staffs thereafter, but never to the pre-strike extent."

insufficient jobs for pre-strike employees, and hence that it could not find that any particular claimant would, completely absent any element of discrimination, have been employed, respondents were nevertheless on that date, and thereafter, guilty of refusing to reinstate all claimants upon discriminatory grounds. A formula was thereupon contrived embracing (a) a lump-sum provision, and (b) a governing proportion. The former was predicated upon the theory that, although there was no proof of discrimination as to any particular claimant, some of the claimants would have been re-employed, absent discrimination, on July 5, 1935, and that their presumptive earnings should constitute a lump-sum for the benefit of all. The governing proportion proceeded from the acknowledged circumstance that the 200 claimants had no better title to available jobs than the 900 other pre-strike employees. In the enforcement proceedings this Board remedy was assailed by respondents as arbitrary and speculative in character; the Board and the petitioners, however, defended it, and at their instance it was incorporated in the final judicial decree. It will be noted that respondents' criticism of this remedy was rejected by the court below upon the ground that, since it amounted to less than a full back-wage award, the respondents were not prejudiced and could not complain (R. 207).

The Present Proceeding Below.

On February 4, 1943, the Board filed its petition in the nature of a bill of review (R. 213). The substantial allegation thereof was as follows (R. 216):

"The Companies, upon the hearing and thereafter, inadvertently or otherwise, withheld from the Board material facts peculiarly within their knowledge concerning the employment situation existing in the enterprises involved in the complaint. By

means of evidence and representations, they induced the Board unaware of the facts so withheld and because said facts were not made known to it, mistakenly to conclude that an unusual condition existed, that the customary and normal remedy of full back pay to each employee discriminated against was inapplicable, and that a special remedy must be devised to conform to a state of conditions which in fact did not exist."

Further (R. 218):

"Thereby the Companies sought to show not only that at all times after July 5, 1935, employment opportunities at their properties were and would continue to be substantially less than they had been when the properties had last been operated prior to said date, but, in addition, that at all times after July 5, 1935, there had been and would be less than sufficient work to afford employment to all the claimants."

As will be hereinafter demonstrated, these allegations were affirmatively disproved by the original record; the court below so found (R. 307, 310). The Board contention below that, at the time of its final order, it had mistakenly believed that at all times after July 5, 1935, "there had been and would be less than sufficient work to afford employment to all the claimants" is in irreconcilable conflict with the explicit findings in that order. Thus the Board found (R. 94):

"* * * 172 names appear on the July 16 payroll which are not listed on July 5. Although no other payrolls were offered, the record shows that the respondents' operations continued to expand after July 15, 1935 * * *. Production is at its lowest ebb in July and is not at its peak until winter and spring. That a substantial number of employees were added after July 5, 1935, is shown by an examination of a 'labor

survey prepared by the respondents and containing a number of men employed from day to day throughout the period in question. This survey shows that on July 5, 1935, 498 men were employed and on November 1, 1935, 864 men were employed.

"We find, therefore, that the respondents had not before July 5, 1935, reached the absorption point in their normal employment requirements, but that on and after July 5, 1935, they had jobs available at least to the extent indicated by the above figures."

It thus appears that the Board recognized that in the brief period from July 5, 1935, to July 16, 1935, 172 employees were hired, and that thereafter respondents' operations continued to expand. Thus it appears that the Board clearly recognized that within approximately ten days after the effective date of the Act jobs were opened up which could have been distributed among 172 of the approximately 200 claimants. The quoted excerpt from the order, moreover, shows that the predecessor Board was thoroughly familiar with the labor survey, showing month by month, week by week, and day by day, every available job, every man employed, by respondents in their operations from a time prior to the strike to a time approximately at the conclusion of the hearing before the Trial Examiner in 1938; these, moreover, were Board exhibits (Board Exhs. 260, 261, 262). The foregoing excerpt further shows that the predecessor Board recognized that between July 5, 1935, and November 1, 1935, an additional 366 men were employed. Since the present claimants number only approximately 200, we suggest that it was a transparent absurdity for the successor Board in the proceeding below to insist that its predecessor understood that after July 5, 1935, employment increased by less than the number of claimants. The quoted finding in the order repudiates such a contention more effectively than any argument. The "pe-

culiar factual situation," discussed in the Board order, was merely that the pre-strike employment level was 1,100 and the July 5, 1935, employment level approximately 600. It further appeared from the undisputed proof, and (as heretofore noted) is now undisputed even by petitioners, that following the strike in 1935 the employment level never rose to its former peak existing before such strike. The Board, as a result, held that all of the pre-strike employees could under no circumstances have been reinstated, irrespective of whether such pre-strike employees were Union or non-Union members, claimants or non-claimants (R. 132 *et seq.*). There is no dispute but that this conclusion was and is true. In order, therefore, to meet the argument of respondents that, under such admitted facts (admitted then and now), there was no showing that any particular claimant would, absent any conceivable discrimination, have been rehired, the Board conceived a remedy designed to compensate the claimants upon a fractional basis (141 F. 2d, l. c. 844). The claimants number 209, and the proof disclosed, the Board found, the court below found, that very shortly after July 5, 1935, there was available employment for them (119 F. 2d, l. c. 913, 914). Thus the court below in the original enforcement proceeding confirmed findings of the Board that, immediately after July 5, 1935, 364 jobs opened up, which were available for the 209 claimants (119 F. 2d l. c. 913, 914):

"On July 5, 1935, the petitioners were operating with about 500 men. Their operations were not fully manned; and the evidence is that some men were taken on, so that by November 1, 1935, they were employing 864 men. The Board found, justifiably that petitioners from July 5, 1935, to November 1, 1935, had jobs available." (Italics ours).

"This Court is of the opinion that if the evidence sustains the Board's finding that the striking employees would on July 5, 1935, *or thereafter while jobs were available*, have applied for reinstatement and would have returned to work except for the illegal condition of reinstatement imposed by petitioners, the Board had authority to make an appropriate order with respect to reinstatement and back wages." (Italics ours).

Thus there was no doubt in the mind of the then Board or of the court below that immediately after July 5, 1935, there was available employment for the 209 claimants. The then Board held, however, and the court below approved the discretionary remedy thereupon improvised, that the availability of jobs for the claimants was not the issue; if there had been no discrimination as charged, all pre-strike employees would have enjoyed equal rights but *all* could not have been rehired; and that, therefore, there being no assurance that any one of the claimants would have been rehired, as against a non-claimant who was also a pre-strike employee, the claimant could at best enjoy only a proportionate, fractional back wage award. It should be stressed again that it is conceded by petitioners that this fundamental premise of the Board remedy is true; it is not claimed that the post-strike employment level ever rose to the pre-strike employment level. This order of the Board was enforced by judicial decree over the vigorous opposition of these respondents. No possible deception on the part of respondents, or misconception of the employment situation on the part of the Board, was or could be shown.

Respondents challenged the sufficiency of the Board pleading; and categorically denied, by verified averments, the factual allegations. Respondents contend that this

final decree could at most* only be vacated by pleading and proof satisfying the recognized requirements of a bill of review, and: (1) that the Board petition failed to state a cause of action, as a purported bill of review, since (a) no fraud was alleged, but at most inadvertent withholding of information in an adversary proceeding, (b) more particularly, no extrinsic fraud was alleged, (c) no newly discovered evidence was alleged (all facts relied upon by the Board appearing in the record before the Court), and (d) the affidavits required for a bill of review were not filed; (2) that the allegations of the Board petition were affirmatively negated by the record before the Court, and by the findings of the Board and the Court in the original enforcement proceeding; (3) that no motion for judgment on the pleadings, in view of the verified categorical denials in the answer, could be entertained. After argument the motion for judgment on the pleadings was denied and the Board petition dismissed with opinion filed (R. 307). The Board thereupon filed a petition for rehearing (R. 313), and petitioners filed a motion to modify the decree or to remand the cause to the Board (R. 327). The latter motion was in the nature of a supplement to the Board's motion for judgment on the pleadings, and was predicated upon the theory that, without hearing or trial, the final decree should forthwith be modified or remanded to the Board to the end that the latter should so modify it (R. 341). It should be noted that the Board petition below was bottomed up-

*The court below was exercising, in the enforcement proceeding, an exclusive statutory jurisdiction. By the statute creating that jurisdiction, thus exercised, it is provided that the judgment and decree of the Court, in an enforcement proceeding, "shall be final" subject only to timely review upon writ of certiorari or certification. 29 U. S. C. A. Sec. 160, p. 239. Hence by explicit statutory provision the finality of such a judgment and decree is immune from attack even by a bill of review.

on the theory that its predecessor, in the final order, had misconceived the factual employment situation by reason of the alleged "inadvertent withholding" of information by respondents. After the opinion of the Court, holding that there was no factual basis for that contention, was filed, petitioners for the first time, in their motion to modify, abandoned the theory of deception and based their claim to relief upon the plain assertion that the Board, in drafting its remedy, had been guilty of unilateral error. Petitioners did not purport to file affidavits showing that such error had actually occurred; their contention was that, as a matter of law, the error was manifest upon the face of the Board order. In their motion petitioners offered no excuse for their failure to seek correction of such allegedly palpable error at the time the Board order was filed and in accordance with the statutory procedure provided. Both the petition of the Board and the motion of petitioners were denied on May 17, 1944 (R. 343). The Board did not seek certiorari. Petitioners did so.

F.

ARGUMENT.**Foreword.**

This is an anomalous and paradoxical proceeding. In the past unsuccessful litigants have on occasion sought to vacate adverse decrees; here the successful litigants seek to vacate in part the favorable decree which they joined in inducing the court below to enter. With that decree, in its entirety, ~~respondents~~ ^{petitioners} have complied, or sought to comply. As a result no restoration of the status quo is possible. The injunctive proceedings of the decree have been entirely satisfied; the claimants have been restored to their employment; thousands of dollars (e. g. to Sheppard, to Rayon) have been paid out under this back-wage award. The period of alleged discrimination, limiting any back-wage award, ended on August 23, 1941 (Pet. Br. p. 14). Hence the requested modification of the decree would necessarily have a retrospective, and not a prospective, operation; it would control not the future but the past. With the lapse of time, moreover, rights of respondents (e. g. certiorari) have been irretrievably lost. The only professed purpose of the Union proceeding is to authorize the Board to revise its discretionary remedy, after rights and liabilities had become fixed thereunder, in order to render it more punitive against respondents. The exercise of that discretion had in the interval become a finality by judgment. There must be an end to litigation, and this is particularly true in actions involving employer-employee relationships.

The general rule that a judgment or decree becomes final upon the ending of the term cannot be challenged. This rule in the instant proceeding is fortified by the precise statutory provision that the court below, on a re-

view and enforcement proceeding, exercised an exclusive jurisdiction, and that its judgment and decree should be final, subject only to timely review thereof upon certiorari. National Labor Relations Act, 29 U. S. C. A., Sec. 160, p. 239. Only under rare and extraordinary circumstances will such a final judgment or decree be reopened or reviewed. Thus Mr. Justice Holmes remarked (*Delaware R. R. v. Rellstab*, 276 U. S. 1, 72 L. Ed. 439, 1. c. 441):

"The witnesses who had testified for the plaintiff at the first trial testified for the defendant at the second; and after the term of the district court in which the foregoing steps had been taken had expired without being extended in any form, the husband made an affidavit showing that his testimony at both trials was false and that in fact he knew nothing about the matter. The trial judge was applied to, and after hearing testimony in open court he made an order on May 9, 1925, purporting to set aside the judgment that had been affirmed by the circuit court of appeals during a previous unextended term. The petitioners thereupon applied to the circuit court of appeals for a writ of mandamus to reinstate the judgment, but the circuit court of appeals held that it had no jurisdiction to grant the writ. 15 F. 2d 137. A writ of certiorari was granted by this court. 273 U. S. 685, 71 L. Ed. 840, 47 Sup. Ct. Rep. 247.

"However strong may have been the convictions of the district judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. The power of the court to set aside its judgment on this ground ended with the term. *Re Metropolitan Trust Co.*, 218 U. S. 312, 320, 54 L. Ed. 1051, 1054, 31 Sup. Ct. Rep. 18. As the court was without jurisdiction to vacate the judgment mandamus is the appropriate remedy unless to grant that writ is beyond

the power of the circuit court of appeals. *Re Metropolitan Trust Co.*, 218 U. S. 312, 321, 54 L. Ed. 1051, 31 Sup. Ct. Rep. 18. We perceive no reason to doubt the power of that court. It had affirmed the judgment of the court below. *Brown v. Alton Water Co.*, 222 U. S. 325, 332, 56 L. Ed. 221, 224, 32 Sup. Ct. Rep. 156. Like other appellate courts (*Re Potts*, 166 U. S. 263, 41 L. Ed. 994, 17 Sup. Ct. Rep. 520), the circuit court of appeals has power to require its judgment to be enforced as against any obstruction that the lower court, exceeding its jurisdiction, may interpose. *McClellan v. Carland*, 217 U. S. 268, 54 L. Ed. 762, 30 Sup. Ct. Rep. 501. The issue of a mandamus is closely enough connected with the appellate power."

Similarly (*Nachod et al. v. Engineering Corp.*, 108 F. 2d 594):

"Our term having expired since the mandate went down, we have no power to recall it. *Bushnell v. Crooke Mining & Smelting Co.*, 150 U. S. 82, 14 S. Ct. 22, 37 L. Ed. 1007; *Scotten v. Littlefield*, 235 U. S. 407, 35 S. Ct. 125, 59 L. Ed. 289; *Watts, Watts & Co. v. Unione*, 2 Cir., 239 Fed. 1023; *Dobson v. United States*, 2 Cir., 31 F. 2d 288. Rule 6(c) of the Rules of Civil Procedure for District Courts, 28 U. S. C. A. following section 723c, does not apply to Circuit Courts of Appeals."

Further (*United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 92, 1 c. 95):

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the

same matter. So in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

"But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, *Res Adjudicata*, Sec. 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. (2 Gilm.) 385; *Kent v. Ricards*, 3 Md. Ch. 396; *Smith v. Lowry*, 1 Johns. Ch. 320; *DeLouis v. Meek*, 2 Greene (Iowa) 55."

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was

actually presented and considered in the judgment assailed."

The rigorous enforcement of this rule is indicated in *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, 1. c. 799;

"But it is a rule equally well established, that after the Term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that Term, by motion or otherwise, to set aside, modify or correct them, and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the Term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks v. R. R. Co.*, (ante, 91); *Public Schools v. Walker*, 9 Wall. 603 (76 U. S., XIX 650); *Brown v. Aspdon*, 14 How. 25; *Cameron v. McRoberts*, 3 Wheat. 591; *Ex parte Sibbald v. U. S.*, 12 Pet. 488; *U. S. v. Glamorgan*, 2 Curtis 236; *Bradford v. Patterson*, 1 A. K. Marsh. 464; *Ballard v. Davis*, 3 J. J. Marsh. 656)."

To the same effect: *Wetmore v. Karrick*, 205 U. S. 141, 51 L. Ed. 745. In a recent authority, wherein an attempt was made to modify a final decree in a National Labor Relations Board proceeding the court remarked (*Stewart Corp. v. National Labor Relations Board*, 129 F. 2d 481, 1. c. 483):

"In determining what is our authority in this and like cases, which are arising constantly now, we are first confronted by the rule of law, that a court has no jurisdiction to modify its final order after the expiration of the term at which it was entered. The

Supreme and inferior Federal courts have so held countless times."

"But these rules, whatever their scope, have no application to the Circuit Court of Appeals (*Nachod et al. v. Engineering Research Corp.*, 2 Cir., 108 F. 2d 954, holding specifically Rule 6 (c) does not apply to C. C. A.), and therefore the loss of jurisdiction with the ending of the term at which the order was entered, still applies unchanged to this court's judgments and decrees."

"We are aided in the decision of this case by the very apt and enlightening opinion of the Court in *United States v. Swift & Co.*, 286 U. S. 106, 52 S. Ct. 460, 462, 76 L. Ed. 999. It involved a consent decree of injunction in a suit by the United States under the Sherman Anti-Trust Act, 15 U. S. C. A., Secs. 1-7, 15 note, by which decree a monopolistic combination of meat packers was dissolved, and the individual units were enjoined from trading in certain foodstuffs outside the meat industry. The packers alleged that changed conditions in the food industry warranted a modification of the decree.

"The Court drew the very logical distinction between injunctions, executory in nature which might, under limited conditions, be modified, and injunctions predicated upon rights fully accrued which could not be subsequently changed.

"We quote from this opinion:

"* * * Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is

subject always to adaptation as events may shape the need. * * *

"The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. * * *

"Our conclusion is, therefore, that while we are without authority, ordinarily, to modify our final decrees after the expiration of the term at which they are entered, there is, as there must be, an exception to this rule, applicable alike to this, as to District Courts. This exception recognizes in us the power to modify any part of a decree which has become inapplicable by reason of changed conditions and circumstances arising subsequent to its entry."

There is no pretense in the instant proceeding that the action of Board or Union is attempted because of any change of conditions subsequent to the entry of the decree.

The fundamental vice underlying every contention of petitioners is ^{the fallacious assumption} that their request for modification of the final decree would result in a decree, prospective in operation only and dealing with future rights, rather than a decree retrospective in operation and dealing with past accrued rights. In seeking vacation of the final decree petitioners deal not with the future but with the past. They concede that "the terminal date of the 6-year period of discrimination which had begun July 5, 1935," was August 23, 1941 (Pet. Br. p. 14). As a result rights and liabilities under the final decree were fixed and fully accrued upon that date. To accede to the relief sought by petitioners would not be to modify a decree, applicable *in futuro*, for prospective operation after such modifica-

tion, but to vacate, nullify and set aside a final decree as of the date of its original rendition. That can be done, if at all, only by compliance by pleading and proof with the essentials of a bill of review. Petitioners do not contend that either they or the Board thus complied in the proceeding below; to the contrary they boldly assert that such compliance was unnecessary, that the doctrine of finality of judgment has no application to a final decree in an enforcement proceeding, and that the Board, after the final decree, had plenary authority to disregard, vacate, or modify that decree without application to the Court for permission to do so. They go further: they assert, without equivocation, that when the Board represents by a pleading to the Court which, at its instance, entered the decree which in the interim has become final, that facts have been discovered or their significance for the first time recognized (although appearing in the original record and fully known to all parties litigant), which in the opinion of the Board justify administrative modification of the final decree, those *ex parte* representations must be accepted by the Court as conclusive findings of fact, and the decree vacated and remanded to the Board for modification without right on the part of the Court to determine whether there is any legal or factual basis therefor. The final contention of petitioners is even more extreme: that if, years after a final decree, an interested union asserts that the Board order and the decree contain upon their face an evident and palpable inadvertent error, although that union joined in the procurement of the decree and failed to exercise its remedy by review, the Court must, without hearing or trial, correct the claimed error by rewriting the final decree or remanding that decree to permit an administrative agency to rewrite it on its behalf. The plain answer to these contentions is that no Court has jurisdiction to vacate a final judgment deal-

ing with accrued rights, except at most upon a bill of review; and no court has authority to delegate control over its processes to an administrative agency.

The questions presented here (Pet. Br. p. 2) were not presented below and were not involved there. They are novel here. We do not understand petitioners to contend that, if the proceeding below was in the nature of a bill of review, and the doctrine of finality of judgment applied to the final enforcement decree, the ruling below, that there was no factual basis therefor, was erroneous or is here reviewable. To the contrary petitioners contend that the doctrine of finality of judgment did not apply; that no proceeding in the nature of a bill of review was necessary, and that exclusive authority was vested in the Board as an administrative agency to control the decree with the right to vacate it or modify it. In fact petitioners suggest that the Board was ill-advised in filing the proceeding below even as a courteous gesture, and that in any event that Court was without jurisdiction or authority to determine whether there was legal or factual basis for the modification sought, and was compelled as an automaton to delegate that control over its own decree to the administrative agency. This theory of petitioners is a complete departure from the theory below, where the doctrine of finality of judgment was conceded, and where the Board unsuccessfully sought to defend its proceeding as in compliance with the requirements of a bill of review. Thus when the decision below did not involve the questions presented here, or require their decision, certiorari should be revoked. *U. S. v. McFarland*, 275 U. S. 485, 72 L. Ed. 386; *Dent v. Swilley*, 275 U. S. 492, 72 L. Ed. 390. As this Court remarked in the latter authority, the grounds which were presented in the petition for certiorari, because of which the writ was granted, do not prove to have a substantial

basis in the record. An analysis of the questions presented will sustain this statement. Thus petitioners submit (*first question presented*) that the court below was precluded from going behind the representations of the Board, seeking to vacate and remand a portion of the decree, to determine whether there was a legal or factual basis therefor; in other words petitioners now assert that when the Board in the proceeding below represented to the court that it had determined "from facts appearing for the first time during its compliance investigations" that the decree should be modified to achieve the relief intended, vacation and remand were mandatory, the court could not "appraise" the evidence or the decree, and that the function of such appraisal was vested exclusively in the Board. Neither Board nor petitioners made such a contention below; to the contrary they sought the judgment of the Court upon this particular issue; and now assail the court below for determining the issue which they presented and upon which they invoked its jurisdiction. Similarly it is suggested (*second question presented*) that claimed palpable error manifest upon the face of the original Board order, inadvertent, intended, or otherwise, which under appropriate procedure could have been reviewed in the enforcement proceeding, compelled vacation or nullification of the final judicial decree entered, and that the court below was compelled, as a matter of law, *eo instante*, upon the mere motion of the Union and the back-wage claimants; containing a representation to that effect, thus to vacate, annul, or modify its final decree without right, authority or jurisdiction on its part to investigate the propriety thereof upon either a legal or a factual basis. Such was not the position of petitioners below; there petitioners' motion purported to be in confirmation and supplement of the Board proceeding in the nature of a bill of review (R. 337). Finally

(third question presented) petitioners assert that the decree, entered by the court below at the instance of the Board and the Union, was unsupported by factual proof, and predicated exclusively upon conjecture and hypothesis, and that the court below, as a result, was under the mandatory duty of vacating that decree at the request of Board or Union, years later, and either rewriting it to conform to the reconsidered opinion of the Board and Union or remanding it to the Board to the end that that administrative agency should thus alter its judicial decree. No such contention was made below. The questions presented are therefore not reviewable, and, since review is restricted to proper questions actually presented in the application for the writ, certiorari should be revoked and review herein denied. *General Talking Pictures Corp. v. Western Electric*, 304 U. S. 175, 1. c. 177, 178, 82 L. Ed. 1273, 1. c. 1275; *Helis v. Ward*, 308 U. S. 365, 84 L. Ed. 327, 1. c. 329; *Dickinson Industrial Site v. Cowan*, 309 U. S. 382, 1. c. 389, 84 L. Ed. 819, 1. c. 825.

Petitioners indulge in a purported statement of facts which is utterly unsupported by the record. The principal record citations are to the averments appearing in the pleadings of Board and Union below; the few remaining, consisting of mere lines, even words, of the certified typewritten record are torn from context. Equally are lines, and even words from briefs (never incorporated in the record or in any bill of exceptions) torn from context. Thus petitioners boldly urge that respondents claimed that employment was unavailable to the claimants because other old employees had successfully reapplied for work, and that they further urged that the reduction in the employment level left a number of jobs which were insufficient for the claimants and other pre-strike employees applying therefor (Pet. Br. p. 7). That is untrue: We shall deal hereafter, demon-

strating its falsity, with the assertion that the exceptions filed challenged the sufficiency of employment possibilities (Pet. Br. p. 8). The Board never assumed, in its original order, that "there were not enough jobs available for all claimants and other old employees desiring to return after the strike" (Pet. Br. p. 9). The Board equally never assumed that "there were and ~~could continue to be~~ at all times less jobs open than old employees available" (Pet. Br. p. 11). When petitioners charge that given evidence of respondents is "untrue" (Pet. Br. p. 16), their record references relate to their own or Board pleadings and not to evidence in the record. The Board "estimates" of the full wages lost by the claimants are unexplained, are unsupported by any proof whatsoever (Pet. Br. p. 17). The answer of respondents never admitted the truth of the assertion that on or after July 5, 1935, there were employment possibilities for all claimants and all other pre-strike employees (Pet. Br. p. 18). We have heretofore noted that it is conceded that the post-strike employment level never reached the pre-strike employment level. While we conceive that petitioners do not contend that the factual decision below was improper (upon the ground that that decision, which the Board and petitioners sought from the Court, was an invasion of the exclusive province of the administrative agency), we propose to document the record to demonstrate that the averments below by Board and Union were false, and so shown by the proof appearing in the record filed before the Court. Thus:

The Theory of the Board Below.

The Board purported to base its proceeding upon two assertions: *First*, that respondents at the hearing of the cause, and thereafter, opposed reinstatement or any award of back wages upon the evidentiary representation

that after July 5, 1935, available jobs were fewer than the number of claimants, or, alternatively, fewer than the combined number of claimants and pre-strike employees (non-claimants) who reapplied therefor; and, secondly, that the then Board understood, and found, the foregoing claimed representation to be true, accepted it as the premise for its discretionary remedy, and embodied it in the formula thereupon contrived. Neither assertion could be sustained; both assertions were affirmatively negated by the record proof. Their insufficiency in law, moreover, as the basis for an attack upon the finality of the decree was self-evident. If the issue in question had been litigated, judgment thereon was final and conclusive; if it has not been litigated, the Board was not misled.

It will be noted that there was no claim of fraud or perjury. The charge by the Board pleading was reduced to the innocuous level of inadvertent non-disclosure; and this was disproved by the record. It is, moreover, a novel doctrine to suggest that respondents in an adversary proceeding were under any legal duty of disclosure. If, however, there had been a representation made, as charged, the Board could cite the record to support the argument; this it failed to do. Petitioners cannot do so. If there had been concealment, the Board could have pleaded the facts thereof; this it failed to do. Petitioners cannot do so. If the Board, misled as is claimed, found such an asserted representation to be true, the final order, or the record evidence, could be specified in confirmation; this the Board failed to do. Petitioners cannot do so. In fact the findings of the Board are unambiguously to the contrary. The charges made were plain conclusions unsupported by proof.

It is undenied (as the record discloses) that all records of respondents were made available at all times to

the Board. Counsel for the Board took advantage of this opportunity; payrolls were exhaustively examined both by counsel and by Union representatives; the record evidence of labor operations, succeeding employment levels as disclosed by the records, were subjected to detailed scrutiny. Board exhibits, Board findings, disproved the Board allegations below. Deception was impossible, and the record conclusively negated any attempt to deceive. The Board remedy was assailed by respondents as arbitrary and unsupported by evidence, and was approved by the court below at the vigorous instance of the Board as within its discretionary powers. Such remedy is now (*semble*) disapproved by petitioners as insufficiently rigorous. The circumstance is entirely ignored that the then Board, upon the basis of its findings, was vested with discretion to award *no* back wages; whether it ordered reinstatement under the powers conferred upon it by the Act, with or without back wages, was unmistakably discretionary. If it chose not to exercise such discretionary powers to their full rigorous and punitive limits, that choice cannot be now challenged or reviewed. Present dissatisfaction by the present Board with its predecessor's discretionary remedy cannot justify its vacation in part or the disregard of the doctrine of finality of judgment or the revesting in the present Board of jurisdiction further to penalize respondents. If that remedy had proved more prejudicial to respondents than planned, in the estimation of the Board, respondents would plainly have been without remedy. The situation in ultimate effect is that the then Board, without fraud or deception, prescribed a discretionary remedy; the present Board regards that discretionary remedy as insufficiently onerous; the latter, therefore, seeks to induce this Court to authorize it to nullify its predecessor's act, its predecessor's exercise of discretion, although it had be-

come final by judicial decree, to the end that a different and more rigorous remedy may now be devised. If such procedure were possible there could be no finality of judgment, and every change of administration could result in a review, and reconsideration, of the judicially concluded acts of previous personnel. Certainty in litigation would disappear.

The Board misconceived the nature of the issues litigated and the defenses made in the original proceeding. Thus the availability of work for the claimants, or for the claimants and reapplicants, was never challenged by respondents. In fact the category or classification "reapplicants" (i. e., men employed on May 8, 1935, other than claimants, who, after July 5, 1935, re-applied for employment) was unknown at the hearing; it was first created in connection with the governing proportion in the formula initially appearing in the final order of the Board. The defense of respondents against the charge of discrimination (as documented hereafter from the record) was not that there was insufficient work to afford employment for all claimants, but that respondents had repeatedly urged them to return to available employment, that they refused, and that their subsequent unemployment resulted not from any act of respondents, not from any insufficiency of employment opportunities, but from their unwillingness to work absent the granting of an admittedly illegal condition. This was the defense at the hearing; this was the defense in oral argument; this was the defense before the court on enforcement proceedings. Curtailment of employment opportunities, reduction in the employment level, following the strike (conceded by the Board and petitioners to have occurred) entered the defense only upon this legal basis: That even if sufficient employment was available for all claimants, even if respondents had

urged the claimants to accept such available employment, as the undisputed proof revealed, a particular claimant could not legally be compulsorily reinstated if his former job, by reason of the sale of properties, change of operations, or other cause, had been in good faith eliminated. In other words respondents contended (and such alone was their evidence) that particular jobs of particular claimants had disappeared; that no man could, as a matter of law, be compulsorily *reinstated* to a position then nonexistent; and that, therefore, as to specified particular claimants, even if *other* work was available, reinstatement to such nonexistent jobs was a legal impossibility. The then Board clearly understood that contention which involved no representation that employment of some character was factually unavailable; in fact the Trial Examiner accepted and approved this legal contention in the Intermediate Report and denied reinstatement to such particular claimants whose particular positions had thus disappeared (Intermediate Report, pars. 101, 102, 115, 116, 117, 118, 119). A reference to the final order of the Board reveals unmistakably both the clarity of its understanding of the contention made by respondents and, as well, the falsity of the suggestion of the present Board that it was deceived into believing that (distinct from the legal position of respondents that no man could be reinstated if his former position had disappeared) employment was not available after July 5, 1935. In fact the Board found, and the court below in its opinion specifically approved the finding, that on and after July 5, 1935, full employment for all claimants was available. Hence even if petitioners had represented the contrary (which they did not) neither the Board nor the court below was deceived.

The Board Findings in the Original Order.

The facts relating to the elimination of particular jobs of particular claimants were submitted to the Board in the form of a factual brief. That the Board clearly understood the theory of respondents (as heretofore discussed) appears from its order:

"The Trial Examiner's recommendation for the dismissal of the complaint in so far as it alleged discriminatory discharge or refusal to reinstate pertained in general to the following categories of employees: * * * (3) those employees who were engaged on May 8, 1935, the time of the strike, in occupations which at the conclusion of the strike had been abolished * * *"

"The respondents contend that, for various reasons; they reorganized their business during the strike and that, as a result, many of the jobs existing on May 8, 1935, were no longer available after the return to work. The evidence shows that certain mines, such as the Tulsa-Quapaw and Grace B mines were sold before July 5, 1935, and were not operated by the respondents thereafter; that shortly after the strike, the National Industrial Recovery Act, under which the respondents were operating a 40-hour week, was declared unconstitutional by the United States Supreme Court, and that on resumption of work, the respondents returned to a 48- or 56-hour week, thereby dispensing with many jobs; and that changes in operations after May 8 and before June 15 ended a miscellany of other jobs. The Trial Examiner found that certain employees claimed by the respondents to have been engaged at such jobs on May 8, 1935, were not discriminated against since on and after July 5, 1935, their jobs had been abolished and work was no longer available to them. To these findings and conclusions the International has accepted, and we find merit in such exceptions."

"Under all the circumstances we do not believe that the respondents have shown that the jobs of these particular claimants have disappeared, but rather only that certain work was curtailed. A legitimate curtailment of work does not, however, necessarily justify exclusion of the claimants from consideration for the jobs remaining. The evidence shows that not actual job disappearance but membership in the International and failure to obtain a blue card were the real reasons for the failure to reinstate this group of men."

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"Under all the circumstances, we find that the respondents have failed to show that the claimants coming within this category would in any event have been refused reemployment, absent illegal conditions."

In view of these findings how could the Board or petitioners contend that the then Board understood that respondents were resisting the reinstatement of *all* claimants upon the theory that a general curtailment of operations had reduced available employment below the level of the number of claimants or of claimants and reapplicants? It is plain that the Board understood that this legal defense was directed against the compulsory reinstatement of those particular claimants whose former positions had been eliminated. When the Board, moreover, found that an illegal condition of employment was the true cause for the failure to reinstate these particular claimants on July 5, 1935, by inevitable implication it found that positions for such claimants were then open and available. We refer to the finding of the Board, and of the court below, in the original enforcement proceeding, heretofore reviewed, as negating the contentions now made by petitioners (*supra*, pp. 21, 24).

Prior to the institution of the present attempted proceeding no issue had ever been raised, no evidence had ever been introduced, as to the number of reapplicants, or the availability of employment for the combined number of claimants and reapplicants. The order, as quoted (*supra*, pp. 21-24), effectively disposes of the present claim of petitioners that the Board then understood that employment for such combined number was unavailable. Counsel for petitioners in this proceeding consistently assume that the claimants numbered approximately 200; at the time of the hearing; however, the claimants numbered approximately 350 (R. 132). In addition to the latter number others were claimants during the hearing but dismissed during its progress (Intermediate Report, par. 114). These claimants refused to return to their employment because, according to the Board, of the imposition of an illegal condition. If, as the Board urged, the initial 400 to 600 men reemployed were overwhelmingly former employees, if, as the Board found, there were only approximately 1,100 employees of respondents at the time of the strike (R. 132), and if from 350 to 400 claimants, pre-strike employees, were admittedly unwilling to work, it is very apparent that the reservoir of other pre-strike employees, possibly available for reemployment, had shrunk almost to the vanishing point. Hence when the Board found that 366 jobs opened up during the period from July 5, 1935, to November 1, 1935, and was thoroughly cognizant from the labor survey (Board Exhs. 260, 261, 262) of the increases in employment thereafter from 1935 to 1938, it becomes a monumental absurdity to contend, without evidence, without any representation shown, without any finding by the Board to that effect, that the latter "understood" that there were throughout this long period insufficient jobs for the combined num-

ber of successful claimants (approximately 200) and re-applicants (employees of May 8, 1934, non-claimants, applying for reemployment after July 5, 1935). The Board, of course, made no such finding and expressed no such understanding. Its understanding, even though the number of reapplicants was never at issue or material under the final order, was obviously and necessarily to the contrary.

It will be recalled that upon the initial reopening of respondents' properties, prior to July 5, 1935, those re-employed were overwhelmingly pre-strike employees. The Board below urged that it understood at the time of its final order that after July 5, 1935, the same situation prevailed. Its own finding negatives the contention. Thus it found that on July 5, 1935, out of a total employment of from 500 to 600 men, 154 were not employed by respondents at the time of the strike. This is now conceded by petitioners (Pet. Br. pp. 9, 10, n. 3).*

The Board in its original order, moreover, found explicitly that work was available throughout 1935 despite the employment of a number of new men. Thus:

"These cards were, of course, made out on the assumption that those for whom they were issued would work, and that, therefore, work would be available. Campbell testified that the fact that a rustling card was made out meant that a person was 'fully entitled' to reemployment, and further that such cards were given, after the plants resumed operation, to every man who applied for them. Campbell stated that he could not recall a single

*The statement (Pet. Br. p. 10, n. 3) that the Board projected this perspective throughout the entire period of discrimination is plainly untrue. Thus the Board found that operations thereafter continued to expand, and that 366 new jobs opened up, available to the claimants, before November 1, 1935 (*supra*, pp. 21-34).

instance in which a rustling card was refused until the end of 1935."

Upon the basis of this finding the then Board held that there was available employment even for those claimants whose particular jobs had disappeared. *A fortiori* this necessarily implied that there was available employment for those claimants whose jobs had not disappeared.

We turn now to the Board remedy to demonstrate that there is not the slightest suggestion that the Board, by reason of representations, non-disclosure, or otherwise, understood that after July 5, 1935, there were insufficient jobs opening up for the successful claimants, or, alternatively, for the combined number of such claimants and reapplicants. We have noted *supra* that such a claimed understanding was impossible in view of the explicit finding of the Board that jobs to the number of 366 came into being after July 5, 1935, and before November 1, 1935. Thus (R. 131):

"All, or such number as may be necessary, of the employees presently working for the respondents who were hired after July 5, 1935, the date on which the conditions of employment imposed by the respondents became illegal, and whose names do not appear on the pay rolls for the week including May 8, 1935, or were not employed by the respondents during the period between that date and July 5, 1935, shall be dismissed, to provide employment for those to be offered and who shall accept reinstatement.

"If thereupon, despite such dismissal, there is not sufficient employment immediately available for all of said employees to be offered and who shall accept reinstatement, all available positions, if any, shall be distributed among such employees, with-

out discrimination against any employee because of his union affiliation or activities, following such procedure and system of employment as has heretofore been applied in the conduct of the respondents' businesses."

It thus appears that the Board made the primary assumption that there were sufficient men hired after July 5, 1935, to render available sufficient jobs for all claimants. Thereafter the order considers the possibility only that sufficient openings would not be available.

Further (R. 132):

"Our order in the present case is designed to achieve the same objective, but the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo. Thus, there were approximately 1,100 employees working for the respondents on May 8, and by July 5, 1935, only approximately 600. Of the 500 not working then, some 350 are claimants in this case, and we have found discrimination as to about 200. We have found that after July 5, 1935, a substantial number of additional men were put to work, but it is apparent from the record that the total pay roll fell a good deal short of the 1,100 figure obtaining before the strike. Thus we have the following situation: had the respondents acted lawfully in re-staffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work, since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large number of the claimants discriminated against would have returned, but here, again, we cannot tell which ones. It does not appear from the record that the respondents followed any set standards, such as seniority, in taking the

men back. It does appear that, as to most positions, one applicant would be as well qualified as another, since no special skills or abilities are ordinarily necessary. The only discernible standards used seemed to be two: a requirement of a blue card, and 'first come, first served.' On this state of the facts, we have no way of knowing which men would have been reinstated had the respondents acted legally—*how many non-claimants, how many claimants whose cases we are dismissing, how many claimants whose cases we are sustaining.*"

"A lump sum shall be computed, consisting of all wages, salaries, and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against. The lump sum shall consist of all such monies so paid to such person during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establishing the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents' pay rolls of May 8, 1935, who applied for work after the respondents, whether successfully or not, after July, 1935. Let us assume for purposes of illustration that the lump sum amounts to \$360,000, that there are 200 claimants discriminated against, and that there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus we assume that two-thirds of the number of jobs would have gone to claim-

ants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against."

Further (R. 133, n. 185):

"If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum."

Petitioners argue that "the peculiar factual situation" contemplated in the order was that there were fewer available jobs than the number of successful claimants or, alternatively, than the combined number of such claimants and reapplicants. This argument is exploded by the excerpt quoted. The Board held that the "peculiar factual situation" was that the evidence disclosed that there were "less jobs open than old employees available." This was concededly true. The employment level following the strike was lower than the pre-strike employment level. That is admitted. It will be recalled that the Board waived any requirement on the part of the claimants to reapply for employment as a condition to proof of discriminatory refusal to reinstate. It placed all "old

employees" (those employed on May 8, 1935) upon substantially the same basis; by reason of the sale of properties, change of operations, and other considerations, the general employment level following the strike was lower than the pre-strike level; the Board necessarily pointed out that all pre-strike employees could not have been re-employed. It did not assert, it did not find, it did not assume, that the approximately 200 successful claimants, and those other pre-strike employees (reapplicants) who applied for reemployment after July 5, 1935, could not have been reemployed in available work. This latter contention by the successor Board was a plain attempt to change and distort the issue and the finding made by its predecessor. That predecessor found merely that following the strike there were not jobs available for all old employees; these old employees included the 200 successful claimants, the 150 to 200 unsuccessful claimants, non-claimants who applied for reemployment, and non-claimants who did not apply for reemployment. The distinction between the finding of the predecessor Board and the untenable contention of its successor and the petitioners, is unmistakable. The evidence disclosed that the Board found that following the strike there were not sufficient openings available for the 1,100 pre-strike employees; the evidence did not purport to show, the Board did not purport to find, that on and after July 5, 1935, there were not sufficient employment openings for the reduced category of the combined number of successful claimants and other pre-strike employees, non-claimants, who applied for reemployment after that date. The former conclusion is fortified by proof and was undenied by the Board; as to the latter conclusion, there was no such issue at the trial. As heretofore noted, however, the Board had access to all pertinent records if it had desired to raise that issue; various payrolls are in evi-

dence and others were scrutinized by Board counsel; the then Board was fully aware from such payrolls and from the labor survey of the number of men employed on July 5, 1935, and at various dates thereafter during that month; that Board was informed, through the labor survey (Board Exhs. 260, 261, 262), of the number of jobs, of the number of men employed, throughout the subsequent period up to the approximate close of the hearing in 1938. It found (as quoted *supra*) that at least 336 new men were added to the payrolls in the period from July 5, 1935, to November 1, 1935; and if the issue of the availability of jobs for the combined number of successful claimants and reapplicants had even been considered by the then Board, the latter would necessarily have known that such jobs became available, as indicated, during the summer of 1935 and thereafter substantially remained available. Any claim of deception, inadvertent or otherwise, is a patent absurdity negated by the record proof and supported by no fact or circumstance in the record. No one can examine the excerpts of the final order quoted *supra*, and the labor survey, and credit the assertions now made by petitioners.

Thus the premise for the Board formula, the peculiar factual situation found, was no more than this: that the employment level following the strike was not so high as the employment level (1,100 men) at the time of the strike. The Board did not challenge the accuracy of this finding. Manifestly no deception was involved therein. The formula was never predicated upon any assumption that after July 5, 1935, there were insufficient jobs for the combined number of successful claimants and reapplicants. It is equally true that no such doctrine was embodied in the formula devised. By that formula a lump sum was to be computed. The method of computation was dependent upon the existence of ei-

ther of two contemplated conditions: (1) During any period, when the number of persons hired or reinstated after July 5, 1935, was less than the number of successful claimants, all earnings paid them went into such lump sum; (2) during any period when the number of persons hired or reinstated after July 5, 1935, exceeded the number of successful claimants, the average earnings paid each of them, multiplied by the number of claimants, went into the lump sum. By reason of pre-strike irregularity of employment on the part of the claimants, the Board restricted them to average earnings of post-strike employees. The present Board ignores this. Since the formula provided for both circumstances, it is undeniable that the then Board contemplated the existence of both conditions. In point of fact, when it found, as noted *supra* (pp. 21-24), that there were at least 366 men thus hired or reinstated, between July 5, 1935, and November 1, 1935, it necessarily recognized that the second condition for the computation of the lump sum prevailed as early as the summer of 1935; its analysis of the labor survey, showing the continuity and increase of employment throughout the succeeding years, necessarily revealed that such condition continued to prevail. The criticized audit of petitioners was conducted precisely upon this basis recognized by the then Board from the inception.

It is significant that the predecessor Board, in formulating the two respective types of period, did not base either type of period upon the circumstance whether during such period the number of available jobs exceeded the number of successful claimants and reapplicants. Entirely to the contrary, in fact, the respective periods were defined and delimited upon the plain basis of whether or not the number of men employed after July 5, 1935 (irrespective of whether they were new employees or reapplicants), exceeded the number of successful claimants. The amount of the lump sum under the formula, therefore, was in no respect dependent upon

the existence or nonexistence, during a given period, of available jobs for the combined number of successful claimants and reapplicants. Whether all men hired after July 5, 1935, were new employees, or whether all men hired after July 5, 1935, were reapplicants, the lump sum computed resulted in the same figure. Let us assume, on the one hand, during a given period, that there were 200 successful claimants and 100 reapplicants, and that 250 men were hired or reinstated after July 5, 1935; let us assume, on the other hand, during a given period, that there were 200 successful claimants and 25 reapplicants, and that 250 men were hired or reinstated after July 5, 1935. In the former instance there were fewer available jobs than the combined number of successful claimants and reapplicants; in the latter instance there were more available jobs than the combined number of successful claimants and reapplicants. In both instances, however, the number of men hired or reinstated after July 5, 1935 (the material factor), exceeded the number of successful claimants. The lump sum, therefore, would be computed in the same way; the same result would be achieved, during both periods; the amount of the lump sum would be identical. Thus it is readily apparent by plain mathematical calculation, that the availability of jobs for the combined number of successful claimants and reapplicants was not a factor incorporated into the formula, and consequently is entirely immaterial in the computation of the back wage award.

The governing proportion, again, is in no sense dependent upon the circumstance whether available jobs were less than, or exceeded the combined number of successful claimants and reapplicants. It proceeds upon the theory that if all old employees of May 8, 1935, successful claimants, unsuccessful claimants, and non-claimants, had simultaneously applied for reemployment following

the strike, with or without the addition of new applicants, there would have been insufficient jobs for all; that the successful claimants enjoyed no preferential rights over the others; and that, therefore, the lump sum should be reduced by a fraction represented by the number of successful claimants as the numerator and the combined number of successful claimants and reapplicants as the denominator. The availability of jobs for the combined number of successful claimants and reapplicants, during any given period, was not a factor in the calculation of the governing proportion. A reapplicant enjoyed the same status as utilized in determining the governing proportion whether his application was successful or unsuccessful (R. 134). Thus let us assume that, on the one hand, during a given period, there were 200 successful claimants, 100 reapplicants, and 250 available jobs for which men were hired; let us assume, on the other hand, during a given period, there were 200 successful claimants, 100 reapplicants and 350 available jobs for which men were hired. In the former instance there were fewer available jobs than the combined number of successful claimants and reapplicants; in the latter instance, there were more available jobs than the combined number of successful claimants and reapplicants. This varying circumstance, however, did not affect either the computation of a lump sum or the determination of the governing proportion. In both instances the lump sum would be determined by multiplying the average wage paid by the number of claimants; in both instances the governing proportion would be two-thirds, i. e., the fraction represented by the number of claimants (200) as a numerator over the combined number of claimants and reapplicants (300) as a denominator. Again is it thus demonstrated that availability of employment, or unavailability of employment, during any period, for both successful

claimants and reapplicants, was not a factor or condition incorporated in the formula, and is thus not material thereto. It is, of course, apparent that the governing proportion was not predicated upon any assumption of any given comparison between the number of successful claimants and the number of reapplicants; the number of the latter was unknown at the time of the order either to the Board or any other litigant; that proportion was intended to meet any possible, although unknown, contingency. The greater the number of reapplicants among men hired or reinstated after July 5, 1935, the less the claimants received; the fewer the number of reapplicants among men hired or reinstated after July 5, 1935, the more the claimants received. Hence if respondents had misled the Board into believing that the proportion of reapplicants among men hired or reinstated after July 5, 1935, was greater than it actually was, under the governing proportion, this operated to the prejudice of respondents. The fewer the number of reapplicants among men hired after July 5, 1935, the better the successful claimants fared, since their share of the distributable lump sum under the governing proportion was thereby increased. The plain fact of the matter is that the predecessor Board, by this formula, because the successful claimants had not in fact applied for reemployment and all old pre-strike employees could not have been reemployed, deliberately substituted the formula for its usual test of whether or not employment for the claimants was available after the date of alleged discrimination, viz.: July 5, 1935. It did so although it found that such employment was thus available. Having substituted its formula, in the exercise of its discretion, for the other and more usual test of availability of employment, such availability of employment became thereunder entirely immaterial. Thus if the employment level on July 5, 1935, was

600, but thereafter dropped to 500, or increased to 700, the decrease or increase, as such, would not affect either the lump sum or the governing proportion under the formula; the lump sum is dependent not upon employment levels, not upon the availability of jobs for the successful claimants, or for the successful claimants and reapplicants, but solely upon the number of men hired after July 5, 1935, and the wages paid them; the governing proportion, again, is not dependent upon employment levels, upon the availability of jobs for the claimants, or for the claimants and reapplicants, but solely upon the proportion of the number of successful claimants to the combined number of successful claimants and successful or unsuccessful reapplicants. The successor Board now asserts (utterly without proof in the record) that its predecessor contemplated that only for rare periods would there be sufficient employment available for both successful claimants and reapplicants; the record affirmatively negatives this assertion; but the fact remains that the Board did not base a formula upon such periods. The then Board could have contrived a formula providing for a lump sum to be created by one method during any period or periods when available jobs were fewer than the combined number of successful claimants and reapplicants, and by another method for any period or periods when the number of available jobs exceeded the combined number of successful claimants and reapplicants. *This it did not do.* Thus the issue raised by the successor Board and by petitioners is a false issue; the Board necessarily knew that after the summer of 1935 there was no question of the availability of employment; and the suggestion that it was in any respect misled is fantastic.

We have referred heretofore to the finding of the Court below in the original enforcement proceeding (119 F. 2d 903, 1. c. 913, 914) that "the Board found, justifiably,

that petitioners (respondents) from July 5, 1935, to November 1, 1935, had jobs available" for the claimants, and that their return to these *available jobs* was prevented only, according to the Board, by the imposition of an illegal condition of reinstatement. In view of the foregoing how can petitioners urge that the Court below, in entering the original decree, was deceived into approving the remedy upon the theory that employment opportunities were not available? We have commented before that this remedy, as against attack by respondents on the ground that it was arbitrary and unsupported by evidence, was sustained upon the theory that it was discretionary, that the Board was the sole judge of the exercise of such discretion, and that, since the full rigorous measure of such discretion had not been exercised against respondents, the latter were not prejudiced and could not complain (l. c. 915). Under the Act the Board had authority to award reinstatement with or without back wages; if it had awarded no back wages, its successor could not complain, and petitioners could not complain; and the latter cannot now urge that, because a greater penalty could have been imposed, the present Board should be permitted to re-exercise a discretion whose exercise long ago became final by judicial decree.

Reference is made by petitioners to the exceptions filed by respondents (Pet. Br. p. 8). The facts are these: The Trial Examiner sustained in part the contentions of respondents that certain jobs had been abolished before July 5, 1935, and that therefore reinstatement was impossible; as to other claimants, under the facts, that contention was disallowed. To avoid interminable duplication in exceptions (there being several hundred claimants) respondents drafted a single exception which, in its various grounds, would apply to *any* claimant. The

exceptions quoted embrace two legal contentions of respondents: (1) That particular jobs of particular claimants had been eliminated, with the result that reinstatement thereto was a legal impossibility; (2) that, if a particular claimant failed to reapply for employment until after another man had been hired in his place, there could be no discrimination in refusing to reemploy him for a job already filled. The predecessor Board recognized that the exception as to a particular claimant whose particular job had been eliminated before July 5, 1935, that no employment was thereafter "available," referred to that contention (and not to any claim that work was unavailable for all claimants) in remarking (R. 100):

"The Trial Examiner found that certain employees claimed by the respondents to have been engaged at such jobs on May 8, 1935, were not discriminated against since on and after July 5, 1935, their jobs had been abolished and work was no longer available to them."

Again we stress the absurdity of suggesting that the phraseology of this exception misled the Board into believing that there was insufficient work for all claimants when such Board, and ~~this~~ ^{the} court affirmatively found to the contrary. Respondents urged these claimants to return, and it is an absurdity to suggest that, at the very time when they were urging them to return, they were asserting that there was insufficient work for them if they did return. The existence of available work was found by the Board; it was found by the court below in the enforcement proceeding; and petitioners cannot now be heard to claim that the Board originally was misled into believing the existence of facts contrary to the explicit Board and judicial findings.

Reference to the appendix attached to the Board's petition is necessary to avoid misconception from its misleading character (R. 231). Exhibit A in the appendix, consisting of an excerpt from the decree, is non-controversial. Exhibit B shows merely the conceded reduction in the employment levels, and the abolition of specific jobs, following the strike. Petitioners do not suggest that this evidence is false or perjured. Exhibit C, excerpts from the Board order, is non-controversial, and has been discussed heretofore. Exhibit D is of the same character. Exhibits E and F, however, are definitely inaccurate, and there is utterly no record support therefor.

It will be recalled that these exhibits are designed to show the falsity of the claimed representation by respondents (which never occurred) that on and after July 5, 1935, there was insufficient work for the successful claimants and re-applicants. Three fallacies underlie the preparation of these exhibits even if they were otherwise accurate: (1) The Board assumed that at the time of the hearing the number of claimants was the present number (approximately 200) of successful claimants; this assumption is untrue; in point of fact we have heretofore noted that at the hearing the number of claimants ~~was~~ between 350 and 400; as a result, it is a plain absurdity to suggest that respondents at the hearing, dealing with nearly 400 claimants, could anticipate, and make a representation upon the basis of, a final Board order sustaining the alleged rights of 200 only; yet the Board, in the second column of these exhibits, in listing the "number of claimants" designates not the number at the time of the hearing, but the number of successful claimants; (2) the third and fourth columns are designated "All other old employees" (i. e., all other pre-strike employees of May 8, 1935). In fact, however, they include only the pre-strike employees who continued in their employment

during the strike or re-applied for employment after July 5, 1935: they do not include the following categories of pre-strike old employees: (a) unsuccessful claimants (numbering 150 to 200); (b) pre-strike employees (non-claimants) who applied unsuccessfully prior to July 5, 1935; (c) old employees who failed to re-apply for employment at any time; hence the fifth column ("number of positions necessary to give employment to all employees") is manifestly untrue as not including the excluded categories; (3) ignoring, in argument, the inaccuracy of the sixth column, to which reference has been made, the seventh column is plainly meaningless since, as noted, *supra*, the Board found, the court below found, that as early as the summer of 1935, positions were available for all successful claimants. Yet the successor Board cited the seventh column, its conclusion, as newly discovered evidence.

Reference is made by petitioners (Pet. Br. p. 8) to the claimed representation on December 13, 1938, that "mines are closing daily." This statement actually appears in the oral argument of counsel for examiner before the Trial Examiner on April 29, 1938. It was merely filed later before the Board in lieu of further oral argument. On either date, however, it was plainly accurate. Any examination of ore prices will disclose that such prices steadily declined during the course of 1937-38. It will be recalled that, following a trial of five months, the cause was argued on the morning after the closing of the evidence (Tr. 8184). Counsel for respondents are quoted as stating that in July, 1935, over ninety per cent of then employees were employees on May 8, 1935. The context clearly indicates that counsel (discussing the issue of strike-breaking) were referring to the percentage of old employees re-employed at the open-

ing of the respective mines, mill, and smelter. This is precisely accurate; upon such reopening ninety per cent, or more, of old employees were re-employed. Different properties opened at different times during June and early July in 1935. In the court below, by briefs, counsel for Board and petitioners sought to convert this statement in oral argument into a representation that, after July 5, 1935, ninety per cent of the employees were pre-strike employees. To do so, they necessarily omitted the concluding sentence of the argument in this connection:

"Such was the situation as we approach the day of July 5th when the National Labor Relations Act became effective."

It is thus unmistakably apparent that counsel for respondents was referring to a time prior to July 5, 1935; and as to such a time petitioners do not challenge the accuracy of his statement. There was, of course, no representation or contention that after July 5, 1935 (as distinguished from the prior period), available jobs went "in the overwhelming majority of cases to old employees." The Board could not be, and was not, misled into accepting any such assumption. Board Exhibits 237, 238, 239 affirmatively show the following: (1) At the Joplin smelter, on July 5, 1935, 88.7% of employees were May 8th employees; this percentage had decreased to 84% by July 16, 1935; (2) at the Galena smelter, on July 5, 1935, 87.3% of employees were May 8th employees; and this percentage had decreased to 71.04% by July 16, 1935; (3) at the mines and the mill, on July 5, 1935, 70.39% of employees were May 8th employees; and this percentage had decreased to 69% by July 16, 1935. In the face of Board proof to this effect petitioners could not contend that the Board understood, from the argument of coun-

sel obviously adverting to a prior period, that after July 5, 1935, 90% of employees continued to be May 8th employees! This is not all. The Board did not proceed upon any such misconception of the statement of counsel, but pointed out that the payrolls of July 5, 1935, revealed that 154 men were employed who were not May 8th employees (*supra*, p. 47). The employment level at that time was from 500 to 600 men, as heretofore noted. Thus the Board found that on July 5, 1935, only from seventy to seventy-five per cent of employees were May 8th employees; the Board was not misled.

In other words, a review of the record demonstrates the complete absence of misrepresentation, concealment, or non-disclosure. All records, or other documents, of respondents were made available to counsel for the Board. That opportunity was fully utilized; counsel for the Board repeatedly admitted that they had enjoyed such complete access to all records of respondents requested. Upon the issue of availability of work, moreover, the undisputed proof revealed that on and after July 5, 1935, respondents were urging the claimants to return to their former employment. It was the Union, and not respondents, which precluded such return. Thus Wilson, Vice-President of the International Union, testified that Potter asserted that the strike was "keeping three or four hundred men" from going back to work (Tr. 83). Berry, similarly, testified that Potter proposed that all claimants return to work on July 16, 1935 (Tr. 2618). It is ridiculous to suggest that respondents were contending both that they had invited all claimants to return to their employment and, also, that they had precluded such return upon the theory of unavailability of work.

Counsel for the Board conceded the good faith of respondents in producing any record or document requested

(Tr. 225). Counsel for respondents readily offered the production of any records required (Tr. 338, 339). Counsel for the Board paid tribute to the "cooperation" from respondents, remarked that it had been unnecessary to invoke "the spirit of a subpoena in the proceedings," and continued that he had been "unaware that counsel would prove so cooperative" (Tr. 524). The Board evidence further revealed that respondents were willing to re-employ all claimants, and that their unemployment resulted from the action of their Union in preventing them from returning to available work (Tr. 2262). Respondents had made available to the Board, and its counsel, all records of any character without the necessity of order or subpoena. So plainly was this true that, when counsel for respondents suggested that a subpoena should issue for certain records under the control of the Board, counsel for the latter remarked (Tr. 3156):

"Any difficulty will be an extreme embarrassment to us in view of your own courtesies."

The circumstances relating to the abolition of jobs were fully revealed to counsel for the then Board (Tr. 5511, et seq.). Company records were not only accessible to the Board but were scrutinized (Tr. 5769). "Representatives of the Union and counsel went over the payroll records of the Company" (Tr. 5830, 5944). Present counsel would suggest that the labor survey (Board Exhs. 260, 261, 262) is not sufficiently explicit. It was prepared, however, in accordance with the express requirements of Board counsel. Thus (Tr. 6181):

"Mr. Avrutis: Then I understand that when we reconvene for the purpose of the defense, respondents will give me a list of their mining properties, of all of their properties operated since the strike, showing the number of men employed and their capacities.

• • •"

Counsel for respondents protested that the preparation of such an exhibit or exhibits was an oppressive burden (Tr. 6181, *et seq.*). The Trial Examiner pointed out to the counsel for the Board that the books of respondents "are open to you" (Tr. 6185). Counsel for the Board announced his intention to examine the books of respondents (Tr. 6188, 6189).

Respondents introduced the report of the President of the International Union wherein he remarked (Tr. 6529):

"The situation in the Tri-State District is a serious one and has many ramifications. In my opinion the strike was ill-advised. The strike should have been called off as soon as the Militia arrived upon the scene, getting the men back to work and reorganizing so that they could be successful at some future date."

It thus appears that there was no question in the mind of anyone as to the availability of work on or after July 5, 1935.

The labor survey was compiled by respondents, at substantial expense, in compliance with the request of the Board (Tr. 6640). The labor turnover was stressed by the Board (Tr. 6688, 6689, 6690). Upon reopening of the smelter, ninety per cent of the men re-employed were former pre-strike employees (Tr. 6712).

Both counsel for the Board and for the Union were thoroughly familiar with the labor survey (Board Exhs. 260, 261, 262); they utilized such exhibits in cross-examination (Tr. 7617, 7618, 7619). The nature of the exhibits introduced by the Board was thoroughly explained (Tr. 7623, *et seq.*). Payroll records of respondents were examined by counsel for the Board (Tr. 7630).

On availability of records the following statement was made without dispute (Tr. 7633):

"The suggestion was made by counsel for the Government that the members of the Union wanted an opportunity to check the original payrolls against the exhibits which we had prepared therefrom and which had been used in these roundtable conferences. The original payrolls were thereupon brought into this courtroom and various representatives of the Union and counsel went over those payrolls, checking them not only against their own records and their own memoranda but checking them for accuracy against the memoranda or exhibits which we had prepared. Perhaps I should say more accurately that they checked those exhibits against our original record to determine that when we were producing the transcripts giving record information we did so carefully, honestly and accurately."

All documents relating to the sale of properties, with the resulting elimination of jobs, were revealed to Board counsel (Tr. 7864, et seq.). We point out again that the labor survey was under constant scrutiny (Tr. 7896). The Board can not dispute that records of respondents were in every respect accessible (Tr. 7926):

"Mr. Madden: We have given the only evidence we can which is the evidence as to our records. We are offering the Government a chance to check those records in such a way that unless we are telling these gentlemen the truth about it they can absolutely determine it."

Respondents in this proceeding desire only that it may be so simplified that there can be no misconception of fact. All records of respondents were at all times available to counsel for the Board; exhibits were prepared therefrom. There was no deception, no concealment, no non-disclosure. Every pertinent issue litigated at the

hearing was thoroughly explored, the evidence thereon was complete and accurate, and the final order of the Board demonstrates the adequacy of proof. There is not a word, not a line of evidence, in the entire record to suggest that respondents at any time contended or represented that there was insufficient work available. To the end that this controversy may be determined from all available record proof we cite other record references material thereto (Tr. 73-84, 225, 226, 338, 339, 523, 524, 525, 2257, 2262, 2265, 2601, 2602, 2607, 2608, 2618, 2619, 2620, 2621, 3154, 3156, 4910, 4914, 5032, 5511, 5512, 5513, 5769, 5770, 5829, 5830, 5944, 5945, 6057-6070, 6181-6185, 6188, 6189, 6219, 6528, 6529, 6577, 6579, 6622, 6623, 6625, 6640, 6666, 6688, 6689, 6690, 6705, 6706, 6712, 6825, 6826, 6827, 6832-6855, 6858-7097, 7098-7224, 7227-7298, 7343-7350, 7351-7390, 7405-7430, 7617, 7618, 7619, 7623-7641, 7864-7866, 7880, 7881, 7895, 7896, 7926, 7927, 8184-8189). Pertinent exhibits have been reviewed heretofore.

A limited portion of the argument of counsel for respondents has been reviewed heretofore (*supra*, p. 63). The primary argument of counsel for respondents, upon the issue of discrimination, was that the claimants had been invited and urged to return to their employment in July, 1935, but had refused to do so. Certainly petitioners will not suggest that respondents were making that defense, that the unemployment of the claimants resulted from their unwillingness to work, and at the same time arguing that no work was available. Thus we quote from the argument of counsel for respondents (Tr. 8184):

"When George Potter, moreover, gave them his advice that day, when he suggested to them to permit the men to return to work, to call off the strike and let the men come back, build up their numerical

strength, and then make their demands, he little knew that he was making a suggestion which would be adopted by the president of the International Union two years later as the thing that wisdom would then have dictated, and he little knew, as well, that the National Labor Relations Board some three years later would hold that his statement was a perfect definition of non-discrimination. I shall demonstrate both of those statements.

"As Potter suggested in July, 1935, when the militia were there, that they ought to call off the strike and permit the men to return to work, so did Reed Robinson in the summer of 1937, in the national convention, advise the members of the International Union that that strike had been ill-advised and that they should have called it off and returned to work in June or July, 1935. He adopted the suggestion of George Potter, made two years before, almost in identical words.

"In other words, if your Honor please, not only did George Potter not refuse to receive these union representatives, but he both received and pleaded with them, a plea endorsed by their national president two years later, to return to work. *Is their subsequent unemployment to be charged to us who pleaded with them to return, or is it to be charged to them who declined to permit them to return and thereby prolonged it?*"

"First of all let us return to the interview with George Potter on the 16th day of July. Was that a discriminatory interview? Was he telling the men, as counsel would have led you to believe this morning, that 'It is too late for you to return to work'? No. His words (in effect) were, 'Why don't you let them return to work? Why don't you men call off the strike, return to work and build up your numerical strength? Why don't you forget this indefensible strike that you never discussed with us in ad-

vance, return to work under the same conditions, and then make your demands?"

"The National Labor Relations Board has held that that statement constitutes a complete answer to the charge of discrimination. That is manifestly a plea to return to work and necessarily not an exclusion of any man from employment. When George Potter was begging them to return to work, who was it kept them away? We could not go to the members of the International Union and make the plea that George Potter made to their officials. That would be coercion under this Act.

"I do not know today whether those officers ever reported to their membership that Potter issued a general invitation as Berry said, 'to return to work and build up your numerical strength.' I suspect that that information was concealed.

"Now, what did Reed Robinson say about that? Certainly your Honor can not say in the light of that conference of July 16, so frank, so fair, so open, that there was any discrimination apparent. Then on August 2nd, 1937, Reed Robinson, president of the International Union, made this statement in his annual report:

The situation in the Tri-State district is a serious one and has many ramifications. In my opinion the strike was ill-advised. The strike should have been called off as soon as the militia arrived upon the scene, getting the men back to work and reorganizing so that they could be successful at some future date.

"Mark you well, if Your Honor please, if Reed Robinson had not known that there was an utter absence of discrimination, would he have made that statement? Does not that statement carry with it the implication that he knew that it was the union, and the union alone, that kept those men from work in the summer of 1935? He says that then, they

should have gone back to work. He implies that that they could have gone back to work."

"I have referred before, I must refer again, to that significant fact testified to by George, testified to by Newby, testified to by Campbell, a fact which could be challenged and disproved if it were not the truth, that when the smelters, the mines and the mill opened, every former employee who wished to return was permitted to do so, and every application made resulted in the issuance of an employment card."

Is it in logic conceivable that respondents were then contending that work for the claimants was unavailable? Their explicit theory was that the unemployment of the claimants resulted from their unwillingness to labor; they had been invited to return to work; and thereby the Board could not have understood the position of respondents (never so expressed directly or indirectly) to have been that the work to which the claimants were invited to return was in fact unavailable. The claim of petitioners, or of the Board, of deception is an afterthought and not a fact.

Petitioners finally make an appeal to the equities of the situation. Those claimed equities have no relation to the issues presented. In point of fact, the purported equities are meretricious. Thus petitioners would argue that the net back-wage award in a nominal amount, as tendered by respondents, is inequitable; but both petitioners and the Board have sedulously concealed their theory or interpretation of the back-wage award which would amount to a net result of \$200,000. The audits, the methods of interpretation, are not before this Court in any record. Thus, petitioners, upon purported Board authority, "estimate" that the full back wages, after in-

terim earnings, would amount to \$800,000 (Pet. Br. pp. 17, 38). There is no record evidence to support this estimate. Similarly, there is no record evidence to confirm the other estimate of the Board, and petitioners, that under the present decree the net back-wage award would not exceed \$200,000. We mention the sum of \$200,000 as being twenty-five per cent of claimed back-wage losses (Pet. Br. pp. 42, 17). There has been, as yet, no authoritative interpretation of the remedial formula which permits this Court to determine (1) the amount of a full back-wage award, or (2) the amount of the present back-wage award. All is speculation. The Board, and the Union, have consistently declined to reveal the interpretation whereunder they arrive at the figure of a net \$200,000 under the present formula. As the court below remarked (R. 310):

"No agreement has been reached concerning the computations and the decree remains to be carried out."

Thus the attitude of petitioners is that they will argue here that the result reached under respondents' interpretation of the formula, in a nominal amount, after deduction of interim wages earned elsewhere during the same period, which is a circumstance they consistently ignore, is manifestly and palpably inequitable, although they contend at the same time that the true result should be approximately \$200,000. They decline, however, to be limited to *that* sum under the undisclosed interpretation of the formula adopted by them and the Board. Thus petitioners seek to convict respondents of an inequitable result without disclosing their contention as to the true result under the formula assailed. All of these estimates are without record support, and remain in the realm of plain speculation. This circumstance may be mentioned as a matter of some materiality. In the motion below peti-

tioners assert that Footnote 185 should be deleted from the Board order as enforced by the decree. Such a deletion would result in absurd consequences which would be indefensible. Thus, under the very theory of petitioners (R. 335), if the footnote were deleted, if the number of new or reinstated employees amounted to 600, then under the very hypothesis of petitioners, using their own ratio (R. 335), the 200 claimants would share *one-half* of the wages of 600 men or plainly fifty per cent more than they could have earned upon full employment. As a result, petitioners before this Court have abandoned the only theory of inadvertent error which they charged in the court below. Now they seek to adopt the theory of unilateral error on the part of the Board which is not claimed to have been the result of any act or omission of respondents, and which, moreover, had its origin in the Board memorandum filed in this Court for the first time and never submitted to the court below (Pet. Br. p. 13; Board Memo. on Cer., pp. 11, 12). In other words, petitioners, in the motion to modify filed below, sought to delete the specified footnote from the original Board remedy; they have abandoned that project because of its plainly absurd consequences. They now seek to substitute therefor a new correction never contemplated before proceedings in this Court. The plain result of the suggested correction now advocated is to destroy the governing proportion except in limited application. That proportion was, however, unmistakably part of the deliberate and intended remedy incorporated in the Board order and subsequently, at the instance of the Board and the petitioners, translated into a final judicial decree. Petitioners argue that the intent of the Board was to award *full back wages* if employment opportunities permitted, and even assailed the court below for challenging that statement. Yet, when we turn to the brief of the Board

in the original enforcement proceedings, we find this statement (p. 65):

"Petitioners [respondents now] cannot and do not challenge the reasonableness of the presumption that, had no discrimination occurred, the strikers here involved would have been reinstated approximately in the proportion which their number bore the sum of that number and the number of other old employees who applied after July 5."

It will be noted (as heretofore pointed out) that the Board thus intentionally awarded only fractional back wages, and this without any reference to whether or not the number of men hired after July 5, 1935, exceeded the number of claimants plus the number of other pre-strike employees who thereafter applied for re-employment.

Petitioners ignore this controlling circumstance: The Board sought to find discrimination, to find that respondents refused to reinstate all claimants, for discriminatory reasons, on July 5, 1935. Petitioners will not contend that all claimants were in fact discriminated against, or denied reinstatement, on that date, or that any Board award of full back wages for all claimants could have been made as of that date. Since July 5, 1935, was the effective date of the Act, the Board was without authority to compel the discharge of a single worker then employed. The jobs then held by new men could not have been distributed among the claimants. The Board recognized that it had no power to compel the discharge of any man employed prior to the effective date of the Act. Hence, on July 5, 1935, there could have been no discrimination in fact, and discrimination could only have occurred thereafter when vacancies became available. When, moreover, on that date (even if every man employed had quit) there were only 600 jobs for 1,100 pre-

strike employees. Hence full back wages could not have been awarded all claimants without a plain denial of due process. *Natl. Labor Relations Board v. American Creosoting Co.*, 139 F. 2d 193, 1. c. 196. Therefore, the Board was driven to a formula. All litigants recognized the situation. Respondents alone resisted its speculative character. No formula, based upon an artificial doctrine of discrimination, from an artificial date of discrimination, can do exact justice. The man who would have been rehired on the artificial date of discrimination is deprived of the full wages which would have been his; the man who would not have been rehired on the artificial date of discrimination is given wages which he would not have received. When respondents urged that this rule-of-thumb formula did not conform to evidence, and was arbitrary and conjectural, the position of the Board, supported by petitioners, was that that issue was none of respondents' concern because the remedy was not so punitive as it could have been. Thus, in the original Board brief in the enforcement proceedings, in answer to the complaint of respondents that there could have been no discrimination, and hence no back-wage award of any character, from the date of July 5, 1935, the Board remarked (p. 66):

" * * * The contention that the order is hypothetically unfair to one member of the group because he would have been reinstated and received full wages for the period, and correspondingly more than fair to another member who would not have been reinstated, is based upon unprovable premises. In any event, we do not see how such a contention is for petitioners to raise; their sole concern should be whether they are required to pay more to the strikers than they would have paid if no discrimination had occurred."

The formula in the remedy was designedly adopted with full knowledge of its nature and effect.

POINT I.

Petitioners are without capacity to prosecute an application for certiorari to review the ruling below upon the Board petition; they were also without capacity to file the motion to modify or remand below. The court below was without jurisdiction to entertain that motion, and petitioners therefore cannot prosecute certiorari from the ruling thereon.

The petition in the nature of a bill of review was filed below by the Board. The decision thereon was rendered. Subsequently only did petitioners file their initial motion (R. 326). There can be no serious dispute but that the controversy adjudicated below involves the administrative remedies to be pursued by the Board in effectuating the purposes of the Act. After the decision adverse to the Board position was rendered by the court below, the Board, the only qualified litigant adverse to these respondents, elected not to seek certiorari. Petitioners, however, notwithstanding this decision of the public administrative agency, proceeded to apply for certiorari independently. The argument permeating their entire petition is that the court below unduly curtailed the administrative rights and functions of the Board in enforcement of its findings. Such enforcement is unmistakably the exclusive function of that administrative agency. Petitioners can neither supersede nor supplant the Board in the administration of its duties; and the Board in turn could not delegate the administration of such duties to petitioners. The latter plainly regard the Board order, enforced by the decree below, as constitutive of private rights to be prosecuted by private means;

the contrary is true, that the rights are public, to be enforced only by the public administrative agency vested therewith. Under the law the Board formulates its order; under the law it determines in what court, when, and by what method, it enforces such order. No person may object other than that person "aggrieved by a final order of the Board" (National Labor Relations Act, Ch. 7, 29 U. S. C. A., Sec. 160 (f)). The relief thus extended, to such person aggrieved, is to apply for a review of the final order by the United States Circuit Court of Appeals.* Without appropriate action heretofore in correction of claimed error, petitioners now seek review by certiorari of the decision below upon the sole ground that the administrative rights of the Board have been unduly curtailed, and that their theory of Board authority is essential to the effectuation of the purposes of the Act. When the Board has elected, as here, not to proceed by certiorari, then petitioners have plainly presumed to seize upon public rights and are manifestly without capacity to sue. They felt it necessary to join the National Labor Relations Board in this proceeding as an adversary party. If the right to administer this Act were not exclusively vested in the Board, incredible conflicts would inevitably arise. The Board would be seeking enforcement by contempt, while an interested union would be seeking enforcement by vacation of a decree. The resulting chaotic confusion need not be stressed. The ap-

*In their motion to modify or remand below (R. 341) petitioners recited that they were aggrieved by the Board's order and decision as enforced by the Court's decree. If they were aggrieved by the Board order, their remedy was by a petition for review before the Circuit Court of Appeals. If they were aggrieved by the final decree of the Circuit Court of Appeals (if that issue were open to them after they had joined in procuring that decree), their remedy was by a timely application for certiorari. They pursued neither remedy.

parent position of the Board in this proceeding, resisting yet consenting, is no answer to this fundamental issue. The Board cannot delegate its duties of enforcement. If petitioners can pursue Board remedies, by belated consent of the Board as, in effect, *amicus curiae*, then they can pursue Board remedies with the Board in opposition thereto. The complete incapacity of petitioners to discharge the administrative functions of the Board, both by this application for certiorari to review a ruling upon a petition which was exclusively that of the Board, and by its motion to modify or vacate the decree below, followed by an attempted review of the ruling thereon by certiorari, is explicit and unambiguous under controlling decisions. *Amalgamated Utilities Workers v. Consolidated Edison*, 309 U. S. 261, 84 L. Ed. 738; *National Licorice Company v. National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799; *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757. As the court remarked in *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757, 1. c. 761:

"It is settled that the Act creates no private right, and that there is no authority anywhere save in the Board itself to inaugurate proceedings for the enforcement of the Board's order or of the decree entered upon its petition. The award of back pay is not a private judgment or a chose in action belonging to the employee, and he has no property right in the award pending his actual receipt of it. Until that time the subject matter remains exclusively under the administrative authority of the Board and in control of the court, and outside interference of any sort would tend inevitably to shackle or impede the free exercise of their powers."

As was further said in *National Labor Relations Board v. Thompson*, 130 F. 2d 363, 1. c. 367:

"We are, however, obliged to bear in mind that a proceeding under the National Labor Relations Act is not litigation between private parties even though the inquisitorial and corrective powers of the Board may not be invoked without a charge being lodged by individual employees or an employee union. It is a proceeding by a public regulatory body in the public interest. It is neither punitive nor compensatory but preventative and remedial in its nature. *N. L. R. B. v. Piqua Munising Wood Products Co.*, 6 Cir., 109 F. 2d 552, 557; *Consumers Power Co. v. N. L. R. B.*, 6 Cir., 113 F. 2d 38. As we said of orders of the Board in *N. L. R. B. v. Colten*, 105 F. 2d 179, 182, 'they are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it.' See, also, *Agwilines, Inc., v. N. L. R. B.*, 5 Cir., 87 F. 2d 146, 150, where it was said:

"The proceeding is not, it cannot be made a private one to enforce a private right. It is a public procedure, looking only to public ends.'"

See further: *National Labor Relations Board v. Killoren*, 122 F. 2d 609, l. c. 612. This issue is jurisdictional. *Greenebaum Tanning Co. v. National Labor Relations Board*, 129 F. 2d 487, l. c. 489:

"In our judgment the Labor Act does not contemplate that the courts function in such a manner. However disturbing the situation may be to petitioner's state of mind, as well as its sincere desire to comply with the decree, there appears little, if any, doubt but that the Act contemplates the Board, and it alone, as the agency empowered to investigate, prefer charges when and if it sees fit, and to carry on the prosecution of such charges. That this is so after decree, as well as before, was decided in *Amalgamated Utility Workers v. Consolidated Edison*

Co., 309 U. S. 261, on page 270, 60 S. Ct. 561, on page 565, 84 L. Ed. 738, wherein the court said:

* * * If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt. * * *

"Therefore we conclude we are without authority in the matter, but even though we are mistaken as to this, we are further of the opinion that the exercise of such authority would serve no good purpose. Respondent's motion to dismiss the petition is therefore allowed."

Similarly: *Stewart Die Casting Co. v. National Labor Relations Board*, 132 F. 2d 801, 1. c. 803:

(1) *The right of petitioners to seek certiorari to review the ruling on the Board petition below.* It appears from the foregoing authorities that the filing of the Board petition below was exclusively the function of the Board. Petitioners did not purport to join therein. When that petition was denied, the Board enjoyed the exclusive prerogative to seek review. In the first authority above cited it is pointed out that no court has jurisdiction to entertain an attempt by any private person or group to discharge the administrative functions vested in the Board (1. c. 270) and that the only right vested in a private person or group is to contest a final order of the Board and not to enforce it (1. c. 266). In seeking certiorari petitioners do not assert that they are contesting a Board order; thereby they seek to enforce a claimed Board remedy. If, moreover, petitioners were to assert that they are seeking to contest a final Board

order, then plainly they are some five years too late to do so under the Act.

(2) *The right of petitioners to file their motion to modify or vacate the decree below, the jurisdiction of the court below to entertain such motion, and their right to seek a review of the ruling thereon.* The arguments heretofore made apply with greater force to the attempt of petitioners to enforce administrative remedies by their independent motion filed below. Their position in this respect, in fact, conflicts with their general position that the Board is vested with exclusive jurisdiction over administrative procedure, and the enforcement judicially of administrative rights. It is plain under controlling authorities, cited *supra*, that petitioners were without right to file their independent motion to modify or vacate the decree, or to seek review by certiorari of the ruling thereon, with the result that such ruling is not reviewable.

POINT II.

The decision below, upon a purely factual basis, cannot be, and is not, in conflict with the decision of any other circuit court of appeals on the same matter, has not decided an important question of federal law which has not been, but should be, settled by this court, has not decided a federal question in a way probably to conflict with applicable decisions in this court, and has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

We have heretofore noted that the alleged "questions presented" were not involved in the decision below, and that that decision was purely factual. A factual decision will not be reviewed upon certiorari. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68

L. Ed. 413; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273; *United States v. Johnston*, 268 U. S. 220, 69 L. Ed. 925. We suggest that petitioners have ignored the recognized limitations upon the function of certiorari: *Magnum Import Co. v. Cory*, 262 U. S. 159, 67 L. Ed. 922.

POINT III.

The court below did not foreclose the Board from taking any proper administrative action; its only ruling was that there was an insufficient basis presented either for vacating its final decree or remanding that portion of the decree criticized to an administrative agency for suggested revision; and petitioners' arguments ignore both the doctrine of finality of judgment and of control by the court below over its own judgments.

It is difficult to understand precisely the theory of petitioners. Thus they venture to assert (Pet. Br. p. 24) that "the present proceeding concerns the procedure to be followed in executing this order," which, at the instance of the Board and petitioners, was translated into a final judicial decree. This statement, of course, is untrue. The present proceeding seeks not to execute the original order and decree, but to vacate and nullify it. Destruction and not execution is the object designed. The only pretense for the action taken is the claim that the Board, during compliance investigations, determined that its remedy, transformed into a final judicial decree, whereunder rights had finally accrued as of August 23, 1941, did not achieve the result intended (Pet. Br. p. 24). This contention, thus alleged, remains in the realm of speculation and conjecture; it is not supported by pleading or proof.

Petitioners next suggest that the Board should have proceeded to modify a final judicial decree of the Circuit

Court of Appeals by independent action without even the courteous gesture of applying to that court for permission so to do (Pet. Br. p. 24), and criticizes that Court for venturing to hold that its decree was under its control and jurisdiction, that it was final, and that it could not be set aside except upon the basic requisites of a bill of review. The decision below does not stand as an injunction (Pet. Br. p. 24) against further administrative action by the Board; if it stands as an injunction at all, that injunction only precludes the Board, an administrative agency, from presuming to vacate and rewrite a judicial decree. We were unaware, prior to this proceeding, that any administrative agency enjoyed or claimed to enjoy that prerogative. It is not strange that petitioners remark that no authorities sustain their position, and that it will therefore be necessary to consider the issues "broadly" (Pet. Br. p. 25). We cannot but feel that a single quotation completely answers the contentions made (*General Tobacco Co. v. Fleming*, 125 F. 2d 596, 1. c. 599):

"In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency. Why, in the context, should any power of review whatever, have been vested in the courts, unless Congress intended that such review should be judicially exercised?"

Thus the alternative theory of petitioners is that after a mere courteous gesture to the court below, the latter, as an automaton, without judicial consideration of the legal or factual basis for the relief prayed, was compelled to grant it at the instance of Board or Union. The requirement of due process cannot be satisfied by such delegation. The court below acted judicially, and the only complaint of petitioners is that it did so and failed to act as if under a conclusive mandate from the Board.

effective upon the filing of the Board pleading. We propose to discuss each of the contentions made by petitioners *seriatim*, and to demonstrate the misconception by petitioners of the respective functions of the court and an administrative agency:

(A) The contention of petitioners that the Board is the proper tribunal to decide whether, after enforcement, further administrative action is necessary.

The difficulty with this contention is that it is not involved in this proceeding. Whether the Board may take further administrative action, after the final enforcement decree, is not in issue. The issue is whether the Board, an administrative agency, may modify or vacate a final judicial decree, or compel the enforcing court to do so upon mere demand. The suggestion (Pet. Br. p. 36) that the court below could no more prevent the Board from modifying a final judicial decree, than it could prevent the Board from issuing a complaint, is revolutionary. Under that theory the judiciary would be subordinated to the administrative agency, and such subordination is inconceivable. Thereby judicial processes would be subjected to the vagaries of administrative action. We proceed to the particular arguments made by petitioners.

(1) The contention of the petitioners that the authority of the Board does not terminate with the entry of a judicial decree. This is academic here. We reiterate: the issue is whether the authority of the Board, after the entry of a final judicial decree, extends to administrative vacation or modification thereof. Industrial relations may be "dynamic and changing" (Pet. Br. p. 27), but no continued supervision is required over a back wage decree fixing accrued rights and liabilities in the past. Petitioners misconceive the functions of the

Board in proceedings supplemental to a final enforcement decree. The Board may determine the concrete amount of back pay *under* a decree; it cannot determine an amount of back pay in violation of a decree. The distinction is manifest. Finally, the court must construe its own decree; it cannot, it should not, delegate that function to an administrative agency; by superlatively stronger reasoning it cannot, it should not, delegate to that administrative agency the modification or vacation of that decree. That is the only issue here.

(2) *The contention of petitioners that, in dealing with unfair labor practices, the courts are limited to specific functions.* Here again we are dealing with an administrative terminology which is without application to the issue involved. The functions of the reviewing Circuit Court of Appeals in a Labor Board proceeding are explicitly delimited. Thus the Board is vested initially with complete jurisdiction; when review or enforcement proceedings are initiated, exclusive jurisdiction passes to and is vested in the court; the final judgment and decree of the court is final subject only to the then timely review upon certiorari. National Labor Relations Act, 29 U. S. C. A., Sec. 160, p. 239. We shall not discuss the rather bold admonitions from petitioners to the courts suggesting that the scope of judicial review, within jurisdiction, should be limited (Pet. Br. p. 33).

(3) *The contention of petitioners that the Board is the proper tribunal to decide whether a given decree will adequately effectuate the policies of the Act.* This is a rather novel doctrine. In other words petitioners assert that any judicial decree, final under the statute, final under the recognized rule that a judgment or decree is final after the term, is subject to revision without notice by the National Labor Relations Board by *ex parte*

determination. The mere statement of the issue defeats the argument. Petitioners venturesomely assert, moreover, that the Board "was ill advised" in seeking judicial approval before it vacated the judicial decree (Pet. Br. p. 36). Counsel for petitioners even disingenuously point out that the court below plainly erred in not pointing out to the Board ~~that~~ the latter "needed no special permission from the court to proceed with its administrative functions" (Pet. Br. p. 37). Apparently petitioners are indulging in a lecture both to the Board and the court below. They rely solely upon the authority of *American Chain & Cable Co., Inc., v. Federal Trade Commission*, 142 F. 2d 909, and seek to distinguish *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364. The two authorities deal with different acts. Any lawyer would challenge the proposition that an administrative agency has the authority to vacate a final judicial decree, and it would take substantial argument to convince him. The *American Chain & Cable Case*, *supra*, does not furnish that convincing argument. It is plainly distinguishable. Thus the Federal Trade Commission Act specifically provides that the Commission "may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section * * *" (142 F. 2d 909, 1. c. 911). There is no such provision in the National Labor Relations Act. Any order, moreover, of the Federal Trade Commission is prospective only, injunctive in its nature, and operates only *in futuro*. Here, since admittedly the terminal date of alleged discrimination was August 23, 1941, any modification pursuant either to the February 4, 1943, petition of the Board, or the May 11, 1944, motion of petitioners, would be retrospective and not prospective in operation. It would deal not with the future but the past. As was pointed out in the

American Chain & Cable Case, *supra*, the modified decree could at most operate only prospectively and in futuro. This distinction is pointed out in the authorities heretofore cited (*supra*, p. 29 *et seq.*). There the *Swift Case* (286 U. S. 106) was mentioned:

"A continuing decree * * * describing events to come is subject always to adaptation as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."

Thus here petitioners do not seek to modify the decree, for the prospective effect thereafter, but to vacate the decree for the retrospective effect theretofore. It is significant that they cite no authority for such an extraordinary procedure. They compare the situation to one prevailing under an alimony decree (Pet. Br. p. 48). Absent specific statutory authority, the very text states that "the power to modify extends only to future installments and not to alimony already accrued" (19 C. J. 273). Petitioners have misconceived their analogy. That which they seek to do here is tantamount to an attempt to revise and increase on January 1, 1944, an alimony judgment which, under its precise provisions, had terminated by, for example, remarriage on January 1, 1942. No judgment may be modified to increase it in the past. If prospective only in operation, if effective only in futuro, it may, upon a change of conditions, be modified thus to operate after the date of such modification. No change of conditions is here involved, or alleged, after the date of the decree, and the only, purported object of the modification sought is that the decree, as modified, should have effect retrospectively, and not prospec-

tively, in the past and not in the future. The fallacy of the entire argument of petitioners is thus apparent. Petitioners have invoked alimony judgments or decrees as a pertinent analogy. The authorities cited destroy their contention. Thus in *Sistare v. Sistare*, 218 U. S. 1, 54 L. Ed. 905, this court held that accrued liabilities could not be affected even by a subsequent lawful modification of a decree. To the same effect: *Caples v. Caples*, 47 F. 2d 225. We have mentioned heretofore that the failure to perceive this distinction was the inherent vice of petitioners' argument (*supra*, p. 34). The ruling in *Ford Motor Company v. National Labor Relations Board*, 305 U. S. 364, 83 L. Ed. 221, namely, that the authority of the Board to modify or set aside its order ends with the filing in court of the transcript of record in connection with the Board petition for enforcement of the order, or in a proceeding for review of the order by a person aggrieved, controls. The decision last cited completely destroys the contention of petitioners that at any time after review or enforcement proceedings jurisdiction was revested in the Board. Thus (l. c. 371):

"* * * It is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding 'and of the question determined therein,' and thus of the power of 'enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board' (Sec. 10(f))."

Further (l. c. 372):

"* * * The Board in the presence of the court's continued and exclusive jurisdiction, remained without authority to deal with its order."

A *fortiori* the contentions of petitioners, that the Board alone must determine whether a final decree should be modified, are without merit.

(B) The contention of petitioners as to the factors governing determination whether a Board order, incorporated in a decree, should be reconsidered.

The foregoing discussion disposes of this argument of petitioners. The suggestion is made that, miraculously, a decree procured by the Board is removed from the scope of ordinary rules of finality. That is not true. Petitioners can cite no authority in support of that doctrine. The Board enjoys no royal prerogative and in fact a royal prerogative is unknown in present-day jurisprudence. *Southern Bell Telephone v. National Labor Relations Board*, 129 F. 2d 410, 1, c. 412. The prerogative suggested, moreover, is (as heretofore specified) in conflict with the controlling statute and the controlling decisions of this Court. Petitioners do not contend, they could not contend, that the proceedings below satisfied the requirements of a bill of review. Their suggestion that they are relieved from the burden of such procedure is both without authority and without merit.

(C) The contention of petitioners that the circumstances of the instant case warrant administrative reconsideration of the back pay remedy.

We have discussed heretofore that the Court, and not the administrative agency, is charged with jurisdiction in this respect.

(1) The contention that the assumptions of the Board, upon which it predicated its formula, were false. The falsity of this premise of petitioners has been heretofore discussed (*supra*, p. 39 et seq.). We have further commented that the Court below was without jurisdiction to disregard its final judicial decree, or delegate that decree for revision to an administrative agency.

(2) *The contention of the Board that Footnote 185 of the formula contains a mistake defeating the expressed intent of the Board.* This was a matter never presented to the court below. As heretofore noted the mistake there-suggested (R. 337) has been abandoned. If this mistake was thus palpable upon the face of the record (and petitioners disavowed any intention of submitting evidence thereon), they have yet to explain their failure to review the error by appropriate procedure. It would be a strange doctrine if the Union, but not the employer, was privileged to correct a final decree after it had failed to take appropriate action under the statute, incident to the enforcement proceeding, as it was required to do.

We have adverted to the circumstance that the appeals to purported equities are without record support (*supra*, p. 71). The court below was certainly vested with the right to determine and to construe its own decree (Pet. Br. p. 42); all relevant factors were considered (R. 307). The suggestion that respondents "shifted their campaign * * * to the more successful practice of extensive judicial review" (Pet. Br. p. 45) is rather meaningless in view of the fact that the Board, and not respondents, have conducted that litigation.

(D) The contention of petitioners that, irrespective of any other consideration, the remedy became inapplicable for the period of discrimination following the close of the hearing by reason of changed circumstances.

This argument requires little answer. There was no evidence of changed circumstances either after the Board hearing or after the final decree. We have reviewed the facts to demonstrate this conclusion.

(1) *The contention of petitioners that the remedy was in greater part prospective, and based upon hypothesis and assumption instead of proven facts.* It comes

with ill grace from petitioners, or from the Board, supporting petitioners, to criticize the Board order on the basis that it was predicated upon "hypothesis and assumption instead of proven fact." *Woolworth v. National Labor Relations Board*, 121 F. 2d 658, 1. c. 663. In other words petitioners seek now to argue that the Board, as in the authorities cited, was entitled to enforce a final decree, based upon hypothesis and assumption, against an employer, over his resistance, but is clothed with a procedural immunity which permits it to disregard, or alter, that finding if it subsequently desires so to do. The facts have been discussed in detail. There is no merit in petitioners' contention.

(2) *The contention of petitioners that a back wage decree is subject to revision if it develops that it fails to accomplish or achieve the results which a subsequent Board asserts the predecessor Board intended.* Again have the facts been discussed both in statement and argument. Petitioners' assumptions are plainly contrary thereto. They cite only the *Corning Glass Works Case* (129 F. 2d 967). There no issue of finality of judgment was involved; there no contention was made that the reviewing court should surrender its control over its own judicial process. That decision was foreign to the issues here. The distinction between retrospective and prospective decrees, and the modification thereof, has been heretofore discussed.

The sole issues raised by petitioners are plainly without substance.

POINT IV.

The Board and petitioners invoked the exercise of the sound discretion of the court below; they cannot complain of the exercise thereupon of such discretion; and plainly the discretion was exercised properly without abuse. The decision below was correct. That decision is not reviewable here.

The foregoing proposition cannot be challenged. Certainly petitioners must recognize the distinction between an attempted remand to the Board for the enforcement of a decree, and an attempted remand designed for its abrogation. Courts of the United States are not compelled to divest themselves of their judicial functions or to transfer such judicial functions to an administrative agency. When the Board below filed its petition in the nature of a bill of review in equity, it undertook the burden of establishing the facts therein alleged. It is elementary that the factual issue was one for the sound discretion of the court below, and that such issue was the only issue determined there. The Board order, and the final decree of June 27, 1941, definitely and irrevocably, fixed the accrued rights involved. No change of conditions thereafter occurred, or are claimed to have occurred. No adjustment was sought either by the Board or petitioners in the interim. There is no arbitrary right to vacate a decree, final under the statute, final by the lapse of time, by a petition in the nature of a bill of review without factual proof in support thereof. When the Board below presented its petition to the court it alleged deception and newly-discovered evidence, together with a claim of due diligence; the certified record, examined by the court below disclosed (as heretofore demonstrated) that each of the claims was equally unfounded. Petitioners, however, contend that the court below, as a

mere automaton, as a rubber stamp, was compelled to place the imprimatur of its approval upon a falsehood or falsehoods, and to vacate its decree *eo instante* and to remand the cause upon the mere demand of an administrative agency. It is self-evident that when the Board, and petitioners, invoked the jurisdiction of the Court below to pass upon the factual issues of the respective petitions for a bill of review, they necessarily submitted those factual issues to that court. Those issues have been decided, and petitioners fail to point out any error in the decision. Petitioners ultimately suggest that the Board was guilty of inadvertent unilateral error entirely divorced from deception. If such error was thus palpable, upon the face of the record, then, as aggrieved litigants, their duty was to file a petition for review. They did not do so. To the contrary they joined with the Board in procuring the decree incorporating the alleged error. There is no claim that this asserted error was subsequently revealed by reason of any newly discovered evidence. In other words, if the error existed, petitioners joined in its commission.

While the issue is not here presented, the ruling of the court below was eminently correct. Petitioners do not contend that, if they and the Board were required to support the requisite, by pleadings and proof, of a bill of review, they did so. As the court remarked in *Central Bank v. Wardman*, 31 Fed. Supp. 685, 1. c. 688, 689:

"The court will treat these motions as bills of review because the relief sought is that commonly sought by such a bill." * * *

"The motions under consideration require the court to look to the evidence. A party is not at liberty to go into the evidence at large in order to establish an objection to the decree founded on the

* We have enumerated, *supra* (p. 26) respondents' contentions below.

supposed mistake of the court in its own deductions from the evidence. *Whiting v. Bank of United States*, 13 Pet. 6, 14, 10 L. Ed. 33; *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381; *Shelton v. Van Kleeck*, 106 U. S. 532, 1 S. Ct. 491, 27 L. Ed. 269; *McGowan v. Elroy*, 28 App. D. C. 84; *Adriaans v. Reilly*, 27 App. D. C. 167."

Sec; in this connection, *Manning v. Insurance Co.*, 107 Fed. 52; *U. S. v. Ali*, 20 F. 2d 998; *Hart v. Wiltsea*, 25 F. 2d 863, and *Roman v. Alvarez*, 30 F. 2d 813. In the authority last cited the court remarked (l. c. 814):

"We are not called upon to decide the merits of the questions raised by the motion and passed upon by the District Court; for that court after the term at which the judgment or decree was entered was without power upon motion to set it aside. *City of Manning v. German Insurance Co.*, (C. C. A.) 107 Fed. 52; *Hart v. Wiltsee*, (C. C. A.) 25 F. 2d 863."

In *Chase v. Driver*, 92 Fed. 780, l. c. 786, Judge Sanborn remarked:

"Moreover, this decree of April 9, 1896, was obtained, not at the suit of the appellees, but at that of the appellant. He it was who prayed for the decree, and who, when it was made, put it into execution. It was at his request, and for his benefit, against the protest of the appellees; that the decree and the sale were made. When the decree was entered, he had the option to refrain from filing his bond, and to appeal to this court for its reversal or modification, or to file his bond and accept the terms of the decree. He chose the latter alternative. He took the benefit of the sale offered him under the decree which he had sought, and it is too late for him now to escape the terms prescribed or the burdens imposed thereby. One who accepts the benefits of a decree or judgment is thereby estopped from reviewing it, or from escaping from its burdens. Al-

bright v. Oyster, 60 Fed. 644, 9 C. C. A. 173, 19 U. S. App. 651. 'Parties to suits must act consistently. They will not be heard to complain of errors which they have themselves committed, or have induced the trial court to commit. *Long v. Fox*, 100 Ill. 43, 50; *Nitche v. Earle*, 117 Ind. 270, 275, 19 N. E. 749; *Dunning v. West*, 66 Ill. 366, 367; *Noble v. Blount*, 77 Mo. 235; *Holmes v. Braidwood*, 82 Mo. 610, 617; *Price v. Town of Breckenridge*, 92 Mo. 378, 387, 5 S. W. 20; *Fairbanks v. Long*, 91 Mo. 628, 633, 4 S. W. 499; *Walton v. Railway Co.*, 56 Fed. 1006, 6 C. C. A. 223, and 12 U. S. App. 511, 513."

In *Hill v. Phelps*, 101 Fed. 650, Judge Sanborn said (l. c. 651, 652, 653, 654):

"The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are (1) error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence; (2) new matter which has arisen since the decree; and (3) newly-discovered evidence, which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered."

"The error in law which will maintain a bill of review must consist of the violation of some statutory enactment, or of some recognized or established principle or rule of law or equity, or of the settled practice of the court. Error in matter of form or in the propriety of a decree, which is not contrary to any statute, rule of law, or to the settled practice of the court, is not sufficient to maintain a suit to review a final decree. *Freeman v. Clay*, 2 U. S. App. 254, 267, 2 C. C. A. 587, 593, 52 Fed. 1, 7; *Hoffman v. Pearson*, 8 U. S. App. 19, 38, 1 C. C. A. 535, 541, 50 Fed. 484, 490. Resort cannot be had to

the evidence to discover this error of law. It must be apparent from the pleadings, proceedings, and decree, without a reference to the evidence, or it will not avail to sustain a bill of review. *Whiting v. Bank*, 13 Pet. 5, 14, 10 L. Ed. 33; *Kennedy v. Bank*, 49 U. S. 586, 609, 12 L. Ed. 1209; *Putnam v. Day*, 22 Wall. 60, 66, 22 L. Ed. 764; *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381. The new matter which will authorize a review of a final decree must have arisen after its rendition. The newly discovered evidence which may form the basis of such a review must be, not only evidence which was not known, but also such as could not, with reasonable diligence, have been found before the decree was made. *City of Omaha v. Redick*, 27 U. S. App. 204, 211, 11 C. C. A. 1, 6, 63 Fed. 1, 6; *Dias v. Merle*, 4 Paige 259, 261; *Henry v. Insurance Co.*, (C. C.) 45 Fed. 299, 303; *Story*, Eq. Pl., Secs. 338a, 423; 1 Barb., Ch. Prac., 363, 364; 1 Hoff., Ch. Prac., 398; *Fost.*, Fed. Prac., Sec. 188, note 19."

"Conceding, however, but not deciding, that the decree in the suit upon the first claim renders the question whether or not the trust deed should be avoided for fraud *res adjudicata* in a subsequent suit for that purpose on the second claim, no ground for review or modification of the decree is presented by the allegations of the bill before us. There was no error in law in that decree. It followed the pleadings, and determined all the issues which they presented. Whether or not it was warranted by the evidence and whether or not the evidence authorized other or further relief, are questions that are not open for consideration here, because the error that will sustain a bill of review must be apparent upon the pleadings, the proceedings, and the decree, without reference to the evidence. There was no error in the failure of the court to grant more relief than the substitution of the joint debt for the separate debt, because it granted ample relief to accomplish

the purpose of the suit, and because, in the absence of the evidence, which we cannot consider, it does not appear that the proofs would have sustained any other relief. One cannot successfully assail the decree of a court of chancery, which has procured him all the resulting benefit he sought, because the court did not make further adjudications and grant other relief, which were not necessary to the accomplishment of the purpose which he disclosed to the court. It is not error for a court of chancery, which grants sufficient relief to enable a complainant to reap all the fruits which he seeks by his litigation, to refuse to exercise all its powers and make other and unnecessary adjudications. The court granted relief which enforced the collection of the only claim which the complainants presented to it. They have received payment of that claim. They suffered nothing in that suit from the failure of the court to avoid the trust deed, because they could have obtained nothing more if it had done so. Courts of equity do not attempt to right wrongs at the suit of those who have suffered nothing from them, or to grant decrees that can give their suitors no relief. *Darragh v. Manufacturing Co.*, 49 U. S. App. 1, 16; 23 C. C. A. 609, 618, 78 Fed. 7, 16. No error appears in the pleadings, proceedings, or decree on account of the fact that the latter may have the effect to estop the appellants from collecting their second claim by avoiding the trust deed for fraud, because that claim was not pleaded, proved, or presented in the suit upon which the decree is based, and its existence was unknown to the court when it rendered its decree. As the question of the effect of its decree upon this second claim was not presented to, considered or decided by, the court below when it entered its decree, it could not have erred upon that question. The bill of review discloses no error in law in the decree which it assails. Nor does the bill disclose any new matter or any newly-discovered evidence which will warrant the relief it seeks. The sole ground for

that relief is that the decree of December 22, 1897, estops the appellants from enforcing the collection of their judgment of December 26, 1896, by an avoidance of the trust deed for fraud. But the debt upon which that judgment is founded existed during the entire pendency of the suit in equity upon the first claim of the appellants, and all the facts which condition the effect of the decree in that suit upon their second claim were as well known to the appellants at the time that decree was rendered as they ever have been since. Mr. Justice Story, at Section 423 of his Equity Pleadings says:

"If, therefore, the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on those facts; for it was his own laches not to have brought them forward at an earlier stage of the cause."

"The decree cannot be modified on account of new matter or newly-discovered evidence, because the matter set forth in the bill existed and the evidence it pleads was known, before the decree was rendered."

"There is another reason why the decree in this case cannot be reviewed. It is that the appellees have paid, and the appellants have accepted, the entire debt which the decree was rendered to enforce. One who accepts the benefits of a verdict, decree, or judgment is thereby estopped from reviewing it, or from escaping from its burdens. *Albright v. Oyster*, 19 U. S. App. 651, 9 C. C. A. 173, 60 Fed. 644; *Chase v. Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Brigham City v. Toltec Ranch Co.*, (C. C. A.) 101 Fed. 85. The decree below is affirmed." (Italics ours).

The enforcement decree was entered in terms prescribed by the Board; it cannot now complain. Particularly is

this true, moreover, when the claimed representation was never made, when the Board was never misled, when its findings followed the facts conceded then and now to be true, and when the court below found affirmatively, and properly, that the work was available which the present Board argues its predecessor was deceived into believing did not exist. That predecessor found that such work was available and did exist. The Court below so found; no deception or misconception was involved; and that, aside from legal issues, should terminate the controversy.

We have adverted to the circumstance that neither the Board proceedings or pleadings, nor petitioners' proceedings or pleadings, below, justified the granting of leave (which the court below denied) to file a bill of review. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 321 U. S. 238, 88 L. Ed. 936, 1. c. 942 and 948, n. 4; *Kithcart v. Life Insurance Co.*, 88 F. 2d 407, 1. c. 410. The phraseology used in the latter authority is directly applicable. If fraud is charged, if misconception is charged, in the Board or petitioners' proceeding below, it is not set out with any particularity. The material facts are not alleged. Even the substance of the inadvertent withholding of information, whatever that may mean, is not averred. Here respondents had records concededly made in every respect available to the representatives of the Board. It was not the duty of respondents to prepare the Board case for trial, but every request or demand by the Board was complied with by respondents. In *Rothschild v. Marshall*, 51 F. 2d 897, 1. c. 899, the court said:

"In a case decided in 1850, the Supreme Court set forth the grounds on which a bill of review may be filed: 'Since the ordinances of Lord Bacon, a bill of review can only be brought for "error in law ap-

pearing in the body of the decree or record," without further examination of matters of fact; or for some new matter of fact discovered, which was not known and could not possibly have been used at the time of the decree. *Kennedy et al. v. Georgia State Bank et al.*, 49 U. S. (8 How.) 586, 609, 12 L. Ed. 1209. See, also, *Hill et al. v. Phelps et al.*, (C. C. A.) 101 Fed. 650, 651, and Cyc., Fed. Proc., Vol. 4, Sec. 1139, pp. 283, 284.

"To relieve against a judgment on the ground of accident or mistake, if it appears at all in a case like the one before us, it must be shown that the complaining party was without fault or negligence. A court is without power to grant relief if it appears that the party alleged to have been aggrieved could have, with proper diligence, prevented the mistake complained of. 'Laches, as well as positive fault, is a bar to such relief.' *Brown v. County of Buena Vista*, 95 U. S. 157, 159, 24 L. Ed. 422. As we shall see in a moment no error of law sufficient to sustain a bill of review was apparent on the face of the record."

Reverting to the question of the sufficiency of the bill of review in the present instance, from the foregoing it is clear that a bill of review can be based upon only two grounds:

"(a) That the judgment contained an error of law apparent on the face of the record.

"(b) That new matter or new evidence was being urged in support of the bill of review.

"If the bill of review is based upon ground (a), it must be filed within the time allowed for the filing of an appeal—or three months from the date of the final decree of the lower court. Cyc., Fed. Proc., Vol. 4, Sec. 1149, pp. 316, 317; 28 U. S. C. A. 230; O'Brien, Manual Fed. App. Proc., p. 94. If it be based upon ground (b), we find that it may not be

filed in the lower court, even by a nonappealing party, when an appeal has been taken, without leave of the appellate court. Cyc., Fed. Proc., Vol. 4, Sec. 1150, p. 318; *National Brake & Electric Company v. Christensen et al.*, 254 U. S. 425, 430-431, 41 S. Ct. 154, 65 L. Ed. 341; *Franklin Savings Bank et al. v. Taylor et al.*, (C. C. A.) 53 Fed. 854, 865-866; *Suhor et al. v. Gooch*, (C. C. A. 4) 248 Fed. 870, 871; *American Foundry Equipment Company v. Wadsworth*, (C. C. A.) 290 Fed. 195, 196."

"Courts of record speak through the judgments or decrees entered upon their records, and where a judgment or decree is unambiguous, an opinion delivered by the judge rendering it at the time the same is entered will not be looked to to give such judgment or decree an effect different from that which clearly follows from the language used." *Kane Hardware Co. v. Cobb*, 79 W. Va. 587, 91 S. E. 454." (Italics ours).

The excerpt last quoted demonstrates that the successor Board cannot ascribe to its predecessor, or to the court below, a claimed understanding contrary to that appearing in the final decree. In *Simonds v. Indemnity Co.*, 73 F. 2d 412, 1. of 415, the court declared:

"Bills of review may be maintained upon the following grounds: (1) For error apparent in the record; (2) newly discovered evidence; (3) fraud in procuring the decree."

"Before entering upon a specific discussion of the status of the instant case, it may be instructive to examine the controlling decisions which condition recovery in suits of this nature."

"Generally speaking, the facts which condition the granting of relief by a court of equity against the enforcement of a judgment are: First, that the

party seeking the relief had a good defense against the cause of action on which the judgment was entered; second, that he was prevented by fraud, concealment, accident, mistake, or the like from presenting such defense; and, third, that he has been free from negligence in failing to avail himself of the defense.' *Continental Nat. Bank v. Holland Banking Co.*, (C. C. A. 8) 66 F. 2d 823, 829."

"Bills of review for newly discovered evidence are not favored by the courts. Their allowance rests upon a sound judicial discretion to be exercised cautiously and sparingly. It must be shown convincingly that the matter could not have been discovered or submitted in the exercise of reasonable diligence, and in time to be presented during the progress of the litigation now culminated in judgment or decree. *Obear-Nester Glass Co. v. Hartford-Empire Co.*, (C. C. A. 8) 61 F. 2d 31, 34; *Southard v. Russell*, 16 How. 547, 14 L. Ed. 1052."

"As said in *United States v. Throckmorton*, 98 U. S. 61, 65, 25 L. Ed. 93, there are no maxims in law more firmly established than that it is to the interest of the public that there should be an end to litigation, and that no one ought to be twice vexed by one and the same cause of action; and further that the doctrine is equally well settled that the court will not set aside a judgment * * * for any matter which was actually presented and considered in the judgment assailed." 1 c., p. 66 of 98 U. S."

In *Railway v. United States*, 106 F. 2d 899, 1 c. 902, the court said:

"We have treated this application as an application for permission to apply to the lower court for leave to file a bill of review. Rules relating to the practice in such matters have frequently been considered by this court. *Obear-Nester Glass Co. v. Hart-*

Jord-Empire Co., 8 Cir., 61 F. 2d 31; *Hagerott v. Adams*, 8 Cir., 70 F. 2d 352; *Kithcart v. Metropolitan Life Ins. Co.*, 8 Cir., 88 F. 2d 407; *Simonds v. Norwich Union Indemnity Co.*, 8 Cir., 73 F. 2d 412, 415.

"Where, as here, the basis for the bill is newly discovered evidence, it is incumbent upon the applicant to show clearly and distinctly the facts claimed to constitute the newly discovered evidence. These facts should be supported by affidavits of witnesses competent to testify to them, so as to enable the court to determine whether the newly discovered evidence when produced will be material to the issue and of such character as probably to change the result. There must also be convincing proof that the parties seeking the review did not have any knowledge of the new matter set forth, at the time of hearing, or when the original decree was entered, and proof which convinces that such alleged facts could not, in the exercise of reasonable diligence, have been discovered."

"No act of the appellee prevented the appellants from introducing any evidence they cared to introduce on this question."

"This charge is based upon the claim that the lower court was misled by the testimony of one of appellee's witnesses as to the percentage of this material which was used commercially secondhand. It is not claimed that by any fraudulent act of the appellee the appellants were prevented from having their day in court, or submitting proof on this issue."

"The mere use of the terms 'fraud,' 'misrepresentation,' and 'untrue testimony' cannot be accepted as facts."

"Fraud, to be available, must be extrinsic to the issues which were determined. *Continental National*

Bank v. Holland Banking Co., 8 Cir., 66 F. 2d 823; *Kithcart v. Metropolitan Life Ins. Co.*, *supra*. Mere erroneous, or even perjured testimony, which relates simply to the issue directly contested, does not constitute extrinsic fraud. *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Continental National Bank v. Holland Banking Co.*, *supra*.

"There is neither adequate averment nor competent proof of newly discovered evidence. Neither has any actionable fraud been alleged, and the inadequate allegation is wholly unsupported by proof."

The application of the foregoing principles to the instant proceeding requires no comment. In *Sorenson v. Sutherland*, 109 F. 2d 714, 1. c. 719, it appears:

"Moreover, if a decree is to be set aside, on the ground of fraud, nine years after it was rendered, the remedy would have to be by bill of review, which would only be allowed if the court were satisfied that the evidence was not available at the time the original suit was litigated and that it was presented without undue delay after discovery. *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97; *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 421, 43 S. Ct. 485, 67 L. Ed. 719."

In *Obear-Nester v. Hartford*, 61 F. 2d 31, 1. c. 34, the court thus defined the doctrine:

"The new evidence must, of course, be material to the issues determined by the decree, and it must appear that the proof has not only come to light subsequent to the entry of decree, but that it could not have been discovered in the exercise of reasonable diligence in time to permit its being used in the original trial. Like motions for a new trial on the ground of newly discovered evidence, a bill of review

for newly discovered evidence is not favored by the courts."

"Ordinarily an application for leave to file a bill of review for newly discovered evidence presents for consideration the question of the materiality of the newly discovered evidence and the diligence exercised by the applicant to secure such evidence."

Respondents have heretofore demonstrated that the proceedings below did not comply with the requisites of a bill of review.

Conclusion.

We have noted heretofore that the Board contemplated the existence of either of two alternative conditions, and necessarily knew that the second condition of its formula (which substantially controls the criticized audit of respondents) came into being in the summer of 1935 and continued to exist thereafter (*supra*, p. 39). Thus, with full knowledge of the actual facts, it prescribed a formula to apply thereto. Thereunder the availability of jobs for all claimants, or for all claimants and reapplicants, became entirely immaterial. When the Board introduced Board Exhibits 237, 238 and 239 (*supra*, p. 63), when the Board introduced Board Exhibits 260, 261, 262, the labor survey showing from a time prior to the strike to a time substantially approximate to the conclusion of the hearing, every job, every man employed, month by month, week by week, day by day (*supra*, p. 23), when respondents affirmatively revealed by Respondents' Exhibits 78, 79, 80, 81, 82, 83, 84, 85, that as early as July, 1935, one hundred fifty-four or one hundred fifty-five men, not pre-strike employees, had already been hired (*supra*, p. 47), when the Board found

that prior to November 1, 1935, three hundred sixty-six men had been employed who were not employed on July 5, 1935 (*supra*, p. 23), creating available employment not only for all successful claimants, but as well for all re-applicants, the instant charge of deception becomes grotesque. This proceeding cannot be maintained.

Implicit in the argument in petitioners' brief is the conception that the Board enjoys a royal prerogative and preferential rights in litigation. This is untrue. *Southern Bell Telephone v. National Labor Relations Board*, 129 F. 2d 410. Thus (l. c. 412):

"And we and other courts have made it clear that in its capacity as accuser the Board under the genius of our institutions is held to the same burdens and obligations of proof as any other litigant who takes the affirmative. It may not, by accusing, put the accused upon proof. As accuser it must prove its charge."

In the initial proceeding the Board was an adversary litigant; and no duty of disclosure was imposed upon respondents. It may be noted parenthetically that no proof of non-disclosure, however, is shown. In this proceeding the Board was an adversary litigant, and its rights did not rise above the level of any other litigant under the same circumstances.

We have adverted heretofore, moreover, to the circumstance that under the Act the Board, upon a finding of discrimination, may award reinstatement with or without back wages. The fallacy of the reasoning of the present Board is that, upon a finding of discrimination,

the maximum rigors of discretionary power must, as of course, be invoked. Such a position is manifestly untenable. A successor Board cannot be heard to assert that the action of its predecessor should be nullified because such action did not impose upon the employer the ultimate in punitive, discretionary remedy. Here the formula of the predecessor Board compelled respondents to set aside, for the benefit of the successful claimants, a fund equal to the average earnings of their putative successors in employment. In other words the successful claimants were credited with the average earnings actually paid those who presumptively, according to the predecessor Board, supplanted them. The Board, therefore, based a back wage award upon the actual experience in wages earned of those who theoretically held, or succeeded to, the successful claimants' jobs. Upon what basis can the successor Board, even if it were free to re-exercise the discretion of its predecessor, argue that this method is inequitable? The substantial character of the award made was reduced only because of the interim earnings elsewhere of the successful claimants.

This record conclusively shows that the successful claimants in their employment before the strike were irregular workers. Their average earnings were therefore reduced. The successor Board, however, asks authorization to award them "full back wages" upon the violent and utterly untenable presumption that if they had been employed on July 5, 1935, there would have been thereafter no turnover in employment, and that they would, without exception, have worked every hour for six years thereafter that respondents' plants operated.

They did not do so before the strike; and upon what basis of logical inference can the successor Board presume that they would have done so following the strike? The record reveals that in the mining and smelting industry, and in the operations of respondents, there is a tremendous labor turnover. That is undenied, but ignored in the present contention made by the successor Board. By what right can the successor Board assume that the claimants would have earned more than their successors, by actual experience, in the same employment? To demonstrate the essential equity of the award in the instant case we caused to be projected, from July, 1935, to the date of reinstatement, the earnings of the claimants as shown by pre-strike experience. Under that calculation, assuming that each claimant would during the six years following the strike not have abandoned his employment or sought employment elsewhere, but continued to have earned his average pre-strike earnings, it appears that only 48 of the approximately 200 claimants would participate in any award (after deduction of interim wages earned elsewhere) and that award would amount to \$29,479.21. Whether the present award under the formula, excluding after-acquired properties, as the Board apparently now contends should be done, would exceed this figure is unknown. Petitioners assert the present award is \$200,000. The fact, however, that the deduction of interim wages has substantially reduced the amount of the back wage award cannot justify vacating the final decree.

Certiorari should be denied and revoked, and the proceeding dismissed.

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APPENDIX A.

William Harry Allen	(Tr. 4211).
William Atkinson	(Tr. 5045).
Joseph H. Ballard	(Tr. 5334).
Ernest Bankhead	(Tr. 5792).
John H. Bankhead	(Tr. 4658).
W. J. Barrett	(Tr. 4915).
John A. Basnett	(Tr. 1690; recalled Tr. 2745 and Tr. 7655).
Theodore R. Bennett	(Tr. 5341).
Charles Beyer	(Tr. 5121).
Harry C. Beyer	(Tr. 4803).
A. G. Black	(Tr. 4765).
Thomas W. Black	(Tr. 4927).
Harry Blasor	(Tr. 4234).
Henry Bloom	(Tr. 5451).
Ernest Bogle	(Tr. 5518; Tr. 5554; Tr. 7727).
Fred Bogle, Senior	(Tr. 4628).
Fred Bogle, Junior	(Tr. 991; Tr. 5571).
James Bogle	(Tr. 4633).
W. E. (Mark) Bond	(Tr. 4115).
Roy Boyd	(Tr. 5519).
Ulyes E. Bradbury	(Tr. 1675; Tr. 2805).
Nick Bratz	(Tr. 5243).
H. E. Bridges	(Tr. 3930).
Paul M. Brooks	(Tr. 5347; Rebuttal Tr. 7815).
E. E. Browning	(Tr. 3773; 3785).
A. F. Bruce	(Tr. 4602).
James O. Bryant	(Tr. 5475).
William F. Bryant	(Tr. 5460).

Excell Bullard	(Tr. 5385).
Archie Bunch	(Tr. 4651).
R. F. Burgett	(Tr. 3412).
Joe E. Cagle	(Tr. 3067).
Raymond Cagle	(Tr. 2872; 2888).
William Henry Cagle	(Tr. 5372; 8168).
Irvin Cannon	(Tr. 4840).
Grant Cavin	(Tr. 5256; 5277).
George W. Clark	(Tr. 4582; 4925; 5037; 5159; 7641).
Gus Cooper	(Tr. 4560).
Roy A. Cottongin	(Tr. 4582; 7832).
Carl Creason	(Tr. 3214).
D. G. Creason	(Tr. 3402).
James A. Curry	(Tr. 4952).
Claude Dalton	(Tr. 4806; 7462).
Ira R. Danel	(Tr. 4540; 5735).
Raymond Danel	(Tr. 2543).
Wm. A. Davidson	(Tr. 4380).
Calvin Davis	(Tr. 4896).
Lester A. Davis	(Tr. 4330).
Melgar Densman	(Tr. 4777).
Lewis DeWitt	(Tr. 5184).
Clyde O. Dimitt	(Tr. 4487).
Clifford Doak	(Tr. 2713).
J. C. Dodson	(Tr. 3786; 7528).
Edward Doty	(Tr. 2766).
Jake C. Emerson	(Tr. 4615; 4641).
Clarence Fanning	(Tr. 4907; 4955).
Everett J. Faries	(Tr. 4527).
Lewis G. Fears	(Tr. 3352).
M. D. Ferguson	(Tr. 4844).
Lawrence R. Fleming	(Tr. 5378).
M. C. Forrest	(Tr. 1772; 2750).
Fred Foster	(Tr. 5617).

Henry L. Freeman	(Tr. 5491; 8149).
John E. Freeman	(R. 3795; 8076).
W. S. Faulkerson	(Tr. 5390).
Kenneth Gary	(Tr. 5664).
J. I. Gosnell	(Tr. 3668).
Otto L. Gray	(Tr. 5040).
Luke A. Griffitt	(Tr. 5189; 5223; 7662).
Wm. I. Guinn	(Tr. 4799).
Wesley D. Hamby	(Tr. 4202; 5956).
H. T. Hamilton	(R. 4783; 7838).
Mack Hanks	(Tr. 824; 2216; 2676).
Curtis Harbaugh	(Tr. 3896).
Albert Hardesty	(Tr. 3769).
Ralph O. Haner	(Tr. 4092).
C. G. Harreld	(Tr. 5592).
Alfred P. Hatfield	(Tr. _____).
Roy A. Hatfield	(Tr. 4482; 4550).
J. R. Hays	(Tr. 4019).
G. M. Headley	(Tr. 3751; 3834).
Lee A. Healy	(Tr. 3766).
Ralph Henderson	(Tr. 5608).
Dan Hensley	(Tr. 4698).
J. R. Hensley (James R.)	(Tr. 3222; 7464).
Vivian Hiatt	(Tr. 7305).
H. N. Hilburn	(Tr. 5204; 5237).
Orvil H. Hobson	(Tr. 4595).
Paul Hollingsworth	(Tr. 3105).
Mrs. Hazel Honeywell, Ad- ministratrix of the Estate of Wm. E. Honeywell	(Tr. _____).
Cleve Horner	(Tr. 4676).
Kenneth Howe	(Tr. 3497).
Ed. A. Huddleston	(Tr. 4419).
J. D. Hughes	(Tr. 5751).
Harry Franklin James	(Tr. 2777).

Cecil Jeffries	(Tr. 4920).
Roscoe Johnson	(Tr. 4424).
J. L. Jones	(Tr. 5278).
M. F. Jones	(Tr. 5713).
Ben V. Kearney	(Tr. 4282).
A. L. Kinkade	(Tr. 4266).
Earl Kohl	(Tr. 5317).
Carl W. Lake	(Tr. 4598).
Alson Lamb	(Tr. 4439).
Dearrell Largent	(Tr. 3363; 7500).
William Charles LaTurner	(Tr. 4962; 8087).
Arthur B. Lindsey (Roger)	(Tr. 4426).
William E. Livingstone	(Tr. 4143; 6126).
John R. McCormack	(Tr. 5681).
James A. McDonald	(Tr. 4646).
Charles McIntyre	(Tr. 5846).
Fred McIntyre	(Tr. 5703).
James F. McIntyre	(Tr. 5860).
Milton McIntyre	(Tr. 5695).
Ray McIntyre	(Tr. 5854).
Kenneth McNutt	(Tr. 5327).
Earl E. Martin	(Tr. 4371).
Orley F. Martin	(Tr. 5673).
Elmer Mast	(Tr. 4462; 7784; 7807).
Ray Mayfield	(Tr. 4351; 8132).
Arthur B. Mays	(Tr. 3331).
John H. Mays	(Tr. 4126).
H. S. Mead	(Tr. 3651).
Everett Messer	(Tr. 4026; 8115).
George Messer	(Tr. 5163; 8129).
John B. Millner	(Tr. 2627).
Chauncey Mitchell	(Tr. 5777).
William Moore	(Tr. 4037).
H. N. Murphy	(Tr. 2669; 6144).
Jess Murray	(Tr. 4053; 7441).

Richard W. Murray	(Tr. 3096; 5964).
Charles H. Newman	(Tr. 2963).
W. C. Novak	(Tr. 2723).
Henry O. Olson	(Tr. 3885).
Eugene Overstreet	(Tr. 4064; 7508).
Walter Overstreet	(Tr. 4828).
Walter W. Parmer	(Tr. 4137).
James B. Parrish	(Tr. 5268).
Charles A. Peterson	(Tr. 3805).
Newton J. Pettitt	(Tr. 4723).
Fred M. Pickett	(Tr. 2104).
Fred Pliler	(Tr. 3909).
Albert O. Plummer	(R. 5625).
George D. Pruitt	(Tr. 4790).
Arthur N. Puckett	(Tr. 5368; 7597).
Wesley Qualls	(Tr. 5837).
Robert M. Ransom	(Tr. 5470).
Chas. T. Rhodes	(Tr. 4059; 7891).
James R. Rhodes	(Tr. 3230; 7880).
Howard Rhyne	(Tr. 4345).
Alfred Louis Rice	(Tr. 7326).
Clarence Rice	(Tr. 5642).
Harry L. Rice	(Tr. 2218).
Harry Elmer Ridgway	(Tr. 5410; 5414).
Lawrence Riley	(Tr. 5125; Recalled Tr. 5422).
Joshua Roberts	(Tr. 3872).
Homer W. Rodgers	(Tr. 3432).
Clifford L. Roy	(Tr. 5742).
Richard Sawyer	(Tr. 4096).
Ted Schasteen	(Tr. 5063; 5120).
Mance F. Selle	(Tr. 3061; 8099).
Ross L. Shaw	(Tr. 3778; 6051).
Walter L. Simpson	(Tr. 4968).
John W. Smith	(Tr. 3844).

Wm. F. Souder	(Tr. 4289; 4294; 7591).
Virgil Spiva	(Tr. 1993; 2587; 2824; 779).
Raymond N. Spurlock	(Tr. 4749).
Warren W. Staats	(Tr. 3799).
Lee Stancoff	(Tr. 5807).
Fay F. Stone	(Tr. 5874).
Willard Stoney	(Tr. 4333).
Samuel G. Sweet	(Tr. 5649).
Earl Earnest Tennis	(Tr. 5056; 7689).
James C. Thompson	(Tr. 5283).
Roy L. Thornton	(Tr. 4341).
William H. Todhunter	(Tr. 2655).
E. A. Treece	(Tr. 4391).
Arch Underhill	(Tr. 2455).
M. J. Vanderpool	(Tr. 3613).
C. E. Van Kirk	(Tr. 4020; 4147).
I. E. Vaughn	(Tr. 3393).
Earl Vinson	(Tr. 3384).
W. H. Vinson	(Tr. 3381).
Andrew Wade	(Tr. 3243).
Clarence Walker	(Tr. 5604).
George R. Wallace	(Tr. 7767).
Charles E. Ward	(Tr. 165; 3194).
Byron F. Warmack	(Tr. 3572; 7486).
John G. Warren	(Tr. 828; 7855).
Harlan Waughtal	(Tr. 3889; 7738).
William Webb	(Tr. 5147; 7568).
Lawrence D. Webster	(Tr. 3661).
P. L. White	(Tr. 3490).
Dorsey Whitlow	(Tr. 5578).
Floyd Williams	(Tr. 3208; 8070).
Ora Williams	(Tr. 3918).
Raymond Williams	(Tr. 3857; 8066).
J. E. Wilson	(Tr. 3790; 8153).
Howard Wimberley	(Tr. 3655).

Todd G. Wisner	(Tr. 3588; 7959).
Elmer Lonnie Wood	(Tr. 3516).
T. D. Wood	(Tr. 2980; 3512).
Glenn Woods	(Tr. 2568).
Lawrence Wood	(Tr. 3464).
Otto Woods	(Tr. 3477).
Scott Yeakey	(Tr. 3200).
W. B. Yingst	(Tr. 3161).
Cecil Yocum	(Tr. 5657).
William Young	(Tr. 3189).

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Supreme Court of the United States

OCTOBER TERM, 1944.

Office - Supreme Court, U. S.

JAN 29 1945

CHARLES ELMORE GROPLEY
CLERK

INTERNATIONAL UNION OF MINE, MILL, AND
SMELTER WORKERS, LOCALS Nos. 15, 17, 107,
108 AND 111, AFFILIATED WITH THE CON-
GRESS OF INDUSTRIAL ORGANIZATION,

Petitioners,

VS.

No. 337.

EAGLE-PICHER MINING & SMELTING COM-
PANY, A CORPORATION, EAGLE-PICHER
LEAD COMPANY, A CORPORATION, AND NA-
TIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUMMARY OF ARGUMENT.

(On Behalf of Respondents Eagle-Picher Mining & Smelting
Company, and Eagle-Picher Lead Company.)

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INTERNATIONAL UNION OF MINE, MILL, AND
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Company, and Eagle-Picher Lead Company.)

FOREWORD.

This proceeding is remarkable in that therein the
successful litigants below seek to vacate in part the favor-
able decree which they joined in inducing the court to

enter. In the interim respondents complied, or sought to comply, therewith, and no restoration of the status quo is possible. The requested modification of the decree would necessarily have a retrospective, and not a prospective, operation, and by compliance rights of respondents have been irretrievably lost. Finality of judgment, both by the expiration of the term, and the provisions of the National Labor Relations Act (29 U. S. C. A., Sec. 160, p. 239), is ignored by petitioners. A final decree can only be vacated at most by pleading and proof satisfying the requirements of a bill of review. *Delaware R. R. v. Rellstab*, 276 U. S. 1, 72 L. Ed. 439, 1. c. 441; *Nachod et al. v. Engineering Corp.*, 108 F. 2d 594; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, 1. c. 95; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, 1. c. 799; *Wetmore v. Karrick*, 205 U. S. 141, 51 L. Ed. 745; *Stewart Corp. v. National Labor Relations Board*, 129 F. 2d 481, 1. c. 483. The vice underlying every contention of petitioners is the assumption that their request for modification of the decree would result in a decree prospective in nature. The contrary is true. They concede that "the terminal date of the 6-year period of discrimination" was August 23, 1941 (Pet. Br. p. 14). As a result liabilities under the final decree were fixed and fully accrued upon that date. To accept the theory of petitioners would not be to modify a decree, applicable thereafter in futuro, for prospective operation only, but to vacate, nullify, and set aside a final decree as of the date of its original rendition. Petitioners do not contend that they or the Board complied with the essential requirements of a bill of review; to the contrary they assert that such compliance was unnecessary, that the doctrine of finality of judgment has no application to a final decree in an enforcement proceeding, and that the Board, after the final decree, had at all times plenary authority to vacate or modify that decree without applica-

tion to the Court for permission to do so, and that, even if permission were sought, the Court was under a mandate to comply with the Board or Union request as a mere automaton. Petitioners ignore the circumstance that that doctrine would compel the delegation by the Court of control over its own processes to an administrative agency. The questions presented here (Pet. Br. p. 2) were not presented below and are novel. As a result they are not reviewable. *U. S. v. McFarland*, 275 U. S. 485, 72 L. Ed. 386; *Dent v. Swilley*, 275 U. S. 492, 72 L. Ed. 390. Certiorari should therefore be revoked. *General Talking Pictures Corp. v. Western Electric*, 304 U. S. 175, 1. c. 177, 178, 82 L. Ed. 1273, 1. c. 1275; *Helis v. Ward*, 308 U. S. 365, 84 L. Ed. 327, 1. c. 329; *Dickinson Industrial Site v. Cowan*, 309 U. S. 382, 1. c. 389, 84 L. Ed. 819, 1. c. 825. The factual assumptions indulged in by Board and Union are negatived by the record. The court below properly so found.

POINT I.

Petitioners are without capacity to prosecute an application for certiorari to review the ruling below upon the Board petition. They were also without capacity to file the motion below to modify or remand the decree. The court below was without jurisdiction to entertain that motion. As a result petitioners cannot seek to review by certiorari the rulings criticized. *Amalgamated Utilities Workers v. Consolidated Edison*, 309 U. S. 261, 84 L. Ed. 738; *National Licorice Company v. National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799; *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757, 1. c. 761; *National Labor Relations Board v. Thompson*, 130 F. 2d 363, 1. c. 367; *National Labor Relations Board v. Killoren*, 122 F. 2d 609, 1. c. 612; *Greenebaum Tanning Co. v. National Labor Relations Board*, 129 F. 2d 487, 1. c. 489; *Stewart Die Casting Co. v. National Labor Relations Board*, 132 F. 2d 801, 1. c. 803.

POINT II.

The alleged questions presented by petitioners were not involved in the decision below. That decision was purely factual. As a result it will not be reviewed upon certiorari. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273; *United States v. Johnston*, 268 U. S. 220, 69 L. Ed. 925; *Magnum Import Co. v. Cnty.*, 262 U. S. 159, 67 L. Ed. 922.

POINT III.

The court below did not foreclose the Board from taking any proper administrative action. Its only ruling was that there was an insufficient basis presented either for vacating its final decree or remanding that portion of the decree criticized to an administrative agency for revision. Petitioners' arguments ignore both the doctrine of finality of judgment and of control by the court below over its own judicial processes. *General Tobacco Co. v. Fleming*, 125 F. 2d 596, 1 c. 599; *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364; *U. S. v. Swift*, 286 U. S. 106, 76 L. Ed. 999; *Sistare v. Sistare*, 218 U. S. 1, 54 L. Ed. 905; *Caples v. Caples*, 47 F. 2d 225; *Southern Bell Telephone v. National Labor Relations Board*, 129 F. 2d 410, 1 c. 412; *Woolworth v. National Labor Relations Board*, 121 F. 2d 658, 1 c. 663.

POINT IV.

The Board and petitioners invoked the exercise of the sound discretion of the court below, and cannot complain of that exercise. Plainly the discretion was exercised properly without abuse. The decision below was correct. Board and Union failed to satisfy the requisites of a bill of review, and the decision below is not here reviewable.

Central Bank v. Wardman, 31 Fed. Supp. 685, 1. c. 688, 689; **Manning v. Insurance Co.**, 107 Fed. 52; **U. S. v. Ali**, 20 F. 2d 998; **Hart v. Wiltsee**, 25 F. 2d 863; **Roman v. Alvarez**, 30 F. 2d 813, 1. c. 814; **Chase v. Driver**, 92 Fed. 780, 1. c. 786; **Hill v. Phelps**, 101 Fed. 650, 1. c. 651-654; **Hazel-Atlas Glass Co. v. Hartford-Empire Co.**, 321 U. S. 238, 88 L. Ed. 936, 1. c. 942 and 948, n. 4; **Kithcart v. Life Insurance Co.**, 88 F. 2d 407, 1. c. 410; **Rothschild v. Marshall**, 51 F. 2d 897, 1. c. 899; **Simonds v. Indemnity Co.**, 73 F. 2d 412, 1. c. 415; **Railway v. United States**, 106 F. 2d 899, 1. c. 902; **Sorenson v. Sutherland**, 109 F. 2d 714, 1. c. 719; **Obear-Nester v. Hartford**, 61 F. 2d 31, 1. c. 34; **Southern Bell Telephone v. National Labor Relations Board**, 129 F. 2d 410, 1. c. 412.

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OCT 18 1944

CHARLES ELWELL DROPLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 337

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS NOS. 15, 17, 107, 108, AND 111,
AFFILIATED WITH THE CONGRESS OF INDUSTRIAL
ORGANIZATIONS, *Petitioners,*

v.

EAGLE-PICHER MINING AND SMELTING COMPANY, A
CORPORATION, AND EAGLE-PICHER LEAD COMPANY, A
CORPORATION, AND NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United
States Circuit Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF AND AMICUS CURIAE
BRIEF ON BEHALF OF THE CONGRESS
OF INDUSTRIAL ORGANIZATIONS

LEE PRESSMAN,
General Counsel,
Congress of Industrial Organizations.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 337

INTERNATIONAL UNION OF MINE, MILL AND SMELTER
WORKERS, LOCALS NOS. 15, 17, 107, 108, AND 111,
AFFILIATED WITH THE CONGRESS OF INDUSTRIAL
ORGANIZATIONS, *Petitioners,*

AGAINST

EAGLE-PICHER MINING AND SMELTING COMPANY, A
CORPORATION, EAGLE-PICHER LEAD COMPANY, A COR-
PORATION,

AND

NATIONAL LABOR RELATIONS BOARD

**MOTION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF AND AMICUS CURIAE
BRIEF ON BEHALF OF THE CONGRESS
OF INDUSTRIAL ORGANIZATIONS**

*To the Honorable Chief Justice and Associate Justices of the
Supreme Court of the United States:*

Pursuant to the provisions of Rule 27(9) of this Court, the Congress of Industrial Organizations made application to all of the parties to the instant case for written consent for the filing of a brief amicus curiae. The Solicitor General on behalf of the National Labor Relations Board gave his consent. Counsel for petitioners likewise consented. The Eagle-Picher Companies have not given their consent. Special reasons for the granting of this motion are contained in the accompanying brief.

INTEREST OF PARTY FILING THIS BRIEF

The Congress of Industrial Organizations seeks leave of the Court to file the within brief. The issues of law raised by the instant case are of signal importance to the administration of the National Labor Relations Act. A denial of the petition will permit to stand a decision of the Circuit Court of Appeals which so enfeebles the power of the Board to effectuate the national labor relations policy as to constitute a severe limitation on the right of employees to self-organization. Moreover, unaltered, the decision of the court below subordinates the judgment of the Board to that of the court on the cardinal matter of fashioning a remedy appropriate to carrying out the purposes of the National Labor Relations Act. The Congress of Industrial Organizations is vitally concerned in the preservation in the Board of this essential function.

STATEMENT

Upon charges filed by petitioner, International Union of Mine, Mill and Smelter Workers, Locals No. 15, 17, 107, 108 and 111, hereinafter called the "Unions," the Board entered an order on October 27, 1939, finding that the companies had committed unfair labor practices in violation of Section 8(1) and (3) of the Act. On June 27, 1941, the court below entered a decree enforcing the Board's order with certain immaterial modifications.

The Board's order as affirmed required the company to reinstate with back pay 209 employees whom the companies had discriminatorily refused to rehire after a strike. The back pay provision differed from the Board's usual order. This arose out of the circumstance that the Board was led to believe that there were fewer jobs after July 5, 1935, when the back pay began to run, than there were claimants and applicants. Hence each claimant could not be awarded the usual amount, which would have been the sum he would have earned in the job less his net earnings elsewhere. The Board therefore devised this formula: to compute as a lump sum all of the wages paid to all persons rehired and reinstated after July 5, 1935, and to award to the claimants that proportion of this lump sum which the number of claimants bore to the total number of pre-strike employees seeking their jobs after July 5, 1935.

The facts upon which this method of computation were based were incorrect. They were incorrect because the companies had misinformed the Board by stating that there were fewer jobs after July 5, 1935, than there were claimants and reapplicants. The Board discovered this inaccuracy when it began an investigation of the companies' records in May of 1942 to determine whether its tender of about \$8,000 as full payment of all back pay due under the decree constituted compliance. The investigation by the Board disclosed that there were a sufficient number of jobs to permit reinstatement of each of the claimants as well as of the reapplicants.

Upon the discovery of this misstatement the Board filed a petition with the Circuit Court requesting its permission to reconsider the back pay provisions of its remedy. The court below denied the Board's petition and the union's petition to the same purpose.

The right to self-organization is no stronger than the power to enforce it. If, as the Circuit Court apparently decides, the Board does not have the power to fashion a remedy to effectuate the policies of the Act, the rights declared in it become snares which jeopardize economic security rather than protective assurances which guard the exercise of the democratic privilege of self-organization. The instant case underlines the serious consequences to the employees involved and to the union which represents them of this denial of the right of self-organization. Over nine years ago the employees of the company sought to exercise their right to organize a union. As of this day, that right, so far as those employees who sought to use it are concerned, constitutes a severe economic penalty, rather than the democratic privilege it was intended to be.

The order of the Board was indisputably based upon a mistake of fact. The mistake is not trivial but extremely serious. If the mistake is not corrected, the amount of back pay which the claimants will receive is three-fourths less than they would have received under the Board's usual back pay remedy. According to the calculations of the Board the employees would receive under its normal remedy approximately \$800,000. Acceptance of the company's interpretation of the current mistake and order would afford the claimants less than three-fourths of one percent of the losses which the companies will

fully caused them during their nine-year period of public and flagrant refusal to comply with the Act.

The core of the right to self-organization is the remedy of back pay. It is a warrant to an employee that the enormous risk of economic insecurity which he takes when he exercises the right to self-organization is worth taking. And in its relation to the employer, this right, buttressed by a proper remedy, is a fairly effective inhibition to the commission of unfair labor practices. Absent this remedy, the right, patently, lacks substance. Hence, the refusal of the court below to permit the Board to make a remedy based upon the actual facts is tantamount to extinguishing a right which Congress has implemented for the protection of American workers. Concretely, in this case, the employers purchase for a small sum, and through the medium of the courts, the extinction of this right and of the labor organization representing those who sought to exercise it. For it is clear that the union must fall, if the order is upheld. We respectfully suggest that neither Congress, nor this Court, ever intended that the Act should be transformed into a weapon against those who use it.

Moreover, the future effectuation of the national labor relations policy will be seriously undercut if the order below is affirmed. Effectuation of the policies of the Act is based upon the notion of administrative expertness. Cognate to this conception is the idea that in order that the expertness may become operative it must be free from judicial encroachment or interference, so that in conformity with Congressional intent, the Board can illumine the facts within its special competence and construct remedies based upon its experience and familiarity with the complicated phenomena of industrial relations and thus perform its exclusive duty to correct, so far as it can, unfair labor practices. This Court has recognized the necessity of preserving the insulation between the administrative and the judicial functions. *National Labor Relations Board v. Waterman Steamship Company*, 309 U.S. 206. In that case this Court emphasized the duty of the reviewing Circuit Courts to follow the Congressional demarcation of power between the administrative agencies and the judiciary. Recognizing that within the fact-finding area the Board's domain is exclusive and may not be trespassed upon by the judiciary, this Court made meaningful the Congressional intent that the Board, and not

the courts, was the instrumentality by which the Act was to be enforced.

What the court said in that case has special pertinence to the circumstances here. It there said at page 222 (309 U. S.) :

"The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment of the disputed facts for the Board's judgment—and power to do that has been denied the courts by Congress."

The court below did precisely what this Court had interdicted in the cited case.

The power to make a finding of fact contains within it the power to correct a finding based upon a mistake. And whether the finding of fact is pertinent to the question as to whether or not an unfair labor practice has been committed or whether it goes to the problem of the nature of the remedy to correct such unfair labor practices is, it is submitted, wholly immaterial to the question as to where that power lies.

It is well known that in the early period of the operation of the Act some Circuit Courts were reluctant to yield to the Congressional intent concerning the separation of powers as between the administrator and the courts, especially in the field of fact-finding. The actual enforcement of the rights guaranteed by the Act was for a considerable period of time, in part weakened by the survival of notions of judicial supremacy in the face of the progress made by the governmental use of administrative devices. Denial of the petition for a writ of certiorari would allow this dangerous precedent to stand, dangerous because it undoes for this case what this Court has accomplished in the *Waterman Steamship* and other cases and imperils the stabilizing authority of those precedents for the future. The success of the companies in this litigation would signalize the effectiveness of delay through the medium of the courts and underline the impotence of the Board to perform its duty to remedy unfair labor practices. Moreover, it invites employers to follow the pattern set by the companies here and, in so doing, destroy the very purposes and objectives of the National Labor Relations Act. And this invitation is offered when a segment of American industry is entertaining the notion that, upon the termination of the war in Germany, the time will have come to return to the period of industrial cretinism; to the pre-war task of destroying labor unions. The

determination of the court below, read in this context, will have a severe and destructive impact upon American workmen and labor unions who seek, in the national interest, to exercise their full strength to cooperate with industry in the solution of the manifold post-war problems facing the country.

CONCLUSION

The petition for certiorari presents a question of major importance for the future administration of the National Labor Relations Act. For the foregoing reasons we join with the National Labor Relations Board and with the petitioners in requesting that a writ of certiorari issue.

Respectfully submitted,

LEE PRESSMAN,

General Counsel,

Congress of Industrial Organizations.

October 1944

SUPREME COURT OF THE UNITED STATES.

No. 337. — OCTOBER TERM, 1944.

International Union of Mine, Mill and
Smelter Workers, Locals No. 15, et al.,
etc., Petitioners,

vs.

Eagle-Picher Mining and Smelting Com-
pany, Eagle-Picher Lead Company,
and National Labor Relations Board.

On Writ of Certiorari
to the United States
Circuit Court of Ap-
peals for the Eighth
Circuit.

[May 28, 1945.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The question presented is whether the National Labor Relations Board after seeking and obtaining a court order of enforcement of its own order, in the absence of fraud or mistake induced by the respondent, and after expiration of the term, is entitled to have the provisions of the decree prescribing the nature of the remedy set aside and the case remanded to it, for the prescription of relief it deems more appropriate to enforce the policy of the National Labor Relations Act.¹

In a proceeding instituted by the petitioner unions the Board found that the respondent companies had been guilty of unfair labor practices in violation of Sections 8(1) and 8(3) of the Act.² The hearings were protracted both as to the alleged discrimination and as to the remedy which should be adopted. With all relevant data open to it, the Board ordered the employers to cease and desist from certain practices and to reinstate 209 employees with back pay. Based on the Board's understanding as to the opportunity for reinstatement of the 209 men in question and all others eligible for reemployment, it devised a formula for the calculation of back pay for the members of the class to whom the award was made.³

The employers were dissatisfied with the order and sought a review by the Circuit Court of Appeals. Thereupon the Board filed a transcript of the record in the same court and sought enforcement of its order. The Unions, who are petitioners in this court, were permitted to intervene and were heard in support of

¹ 49 Stat. 449; 29 U. S. C. 151 ff.

² 29 U. S. C. 158(1), (3).

³ 16 N. L. R. B. 727; 19 N. L. R. B. 320.

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the Board's order. The court modified the order as to matters not here relevant and decreed enforcement.⁴ Two paragraphs of the decree thus obtained by the Board with the assistance of the present petitioners specified the method of computing back pay to the claimants whom the Board had found entitled. This decree was entered June 27, 1941. The companies proceeded to compute back pay due the claimants in accordance with the terms of the decree and tendered the amount they ascertained to be due thereunder. The Board, by its agents, examined the corporate records and reached the conclusion that a different method of compensation to the claimants should have been adopted in the original proceeding.

February 4, 1943, nearly two years after the final decree, and after attempted compliance by the employers, the Board petitioned the Circuit Court of Appeals to vacate that portion of its decree which dealt with the award of back pay and to remand the cause to the Board. The petitioner labor unions were permitted to intervene and to support the Board's petition.

It is somewhat difficult to characterize the allegations of the petition. It does not accuse the companies of fraud, but indicates that certain evidence produced by them created a wrong impression on the mind of the Board which could have been corrected had they gone into greater detail and disclosed certain facts within their knowledge, and it avers that the Board prescribed its remedy in reliance upon a mistaken understanding of conditions touching possible reemployment of the claimants. To this petition the employers replied challenging the jurisdiction of the court to vacate its decree, moved to dismiss the petition, and answered on the merits, categorically denying the averments of the petition. Thereupon the Board moved for judgment on its motion. The matter was heard. The court held that there had been no showing that the order and decree were obtained by misrepresentation or wrongful conduct of the employers or that any mistake of the Board had resulted in a decree which was unfair, and consequently held that there was no justification for revocation or remand of the portion of the decree involved. The petition of the Board was accordingly dismissed.⁵ The Board did not apply for certiorari but the intervening unions whose petition had also been dismissed applied for the writ. The Board was made a respondent in this court but appeared in support of the petition.

⁴ 119 F. 2d 903.

⁵ 141 F. 2d 843.

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The employers made a persuasive showing that, as respects material elements of the problem of back pay, the record of the Board's hearing, and the decision of the Circuit Court of Appeals enforcing the Board's order, demonstrate that all the facts now relied upon by the Board for revocation and reformation of its order sufficiently appeared prior to the entry of the order. In the view we take, it is unnecessary to consider this matter.

They also attack the standing of the petitioners to seek review by this court when the Board, the body charged with the enforcement of the National Labor Relations Act, has elected not to seek review. We think that, in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings,⁶ had standing to seek review of the order denying the Board's petition.

The important question presented is whether, despite a decree entered at the Board's behest, prescribing the method of enforcement of the relief granted by the Board, that body retains a continuing jurisdiction to be exercised whenever, in its judgment, such exercise is desirable and may, therefore, oust the jurisdiction of the court and recall the proceeding for further hearing and action.

It will be noted that this is not a bill of review based upon fraud or mistake. If it were to be treated as such obviously the relief prayed could not be granted without a trial, in view of the issues made by the employers' answer. The Board's insistence is that, upon its petition, the averments of which are denied, it is entitled to an opening of the decree and the remand of the cause upon its mere statement that it now thinks the relief originally granted was inappropriate to the situation as the Board now conceives it.

We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any further facts should be developed the court may remand the cause to the Board for the taking of further evidence and for further consideration.

⁶ *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 362-363; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 193.

⁷ *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 218; *Williams v. Morgan*, 111 U. S. 684.

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(§ 10(e)).⁴ But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board the judgment "shall be final." It is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases. (§ 10(e) *supra*.) The position of the petitioners is, and necessarily must be, that, while the court's decree is final as respects the matter of the alleged unfair labor practices found by the Board, it is never final as respects the relief prescribed by the Board. It must follow that at any time, however remote, and for any reason satisfactory to the Board, it may recall the proceeding from the Circuit Court of Appeals insofar as concerns the relief granted and start afresh as if an enforcement decree had never been entered.

Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them. The petitioners' contention is that the nature and extent of the back pay remedy are primarily and peculiarly matters lying within the administrative discretion of the Board, (see *Phelps Dodge Corp. v. National Labor Relations Board*; 313 U. S. 177, 194; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 600) and that a court's function is limited to imparting legal sanction to the back pay remedy once it has determined that the Board has acted within the confines of its authority, since a court is prohibited from exercising the discretion reposing exclusively in the Board; and it can, therefore, neither affirm nor reverse a Board order relating to back pay on the basis of its own conception of effectuating the policies of the Act.

All this is true, and we have allowed the Board great latitude in devising remedies which it deems necessary to effectuate the purposes of the Act. But it is not we who essay to interfere with the discretion of an administrative body; it is the Board which is seeking to vacate a court order. The Board had exercised its discretion and devised a remedy. It gave long consideration to the problem of adequate relief for the employees discriminated against, and now asserts that it made a mistake. That is all that

it asserts—not even the Board claims that the court below is usurping its functions. What the Board complains of is that it is not permitted to exercise its admittedly wide discretion a second time, or any number of times it may choose.

Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modification should conditions change. But here the order was definite and complete; it contemplated only arithmetical computation. The conditions remained the same; what had changed was the Board's awareness of them. Discussion of the Board's peculiar administrative ability serves no end where the matter is one of simple mistake. It rings hollow when it refers to what on the whole is little more than a mistake in arithmetic, and, in one instance, is just that.

Not only has this Court allowed large scope to the discretion of administrators, but the National Labor Relations Act specifically gives the Board wide powers of modification. Until the transcript of a case is filed in court, the Board may, after reasonable notice, modify any finding or order in whole or in part.⁹ After the case has come under the jurisdiction of the court, either party may apply to the court for remand to the Board.¹⁰ There is no dearth of discretion or opportunity for its exercise, but opportunities should not be unlimited. If the petitioners are right, it must follow that in any case in which the court refuses to remand, the Board need merely wait until the "final" decree is entered and then proceed to resume jurisdiction, ignore the court's decree, and come again to it, asking its imprimatur on a new order.

Petitioners place great reliance on *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. 2d 909, but far from supporting them, that case emphasizes the lack of statutory authority here for what was permitted there. There, the court ordered the Federal Trade Commission to consider a petition that the Commission ask the court to vacate its enforcing decree because of war conditions. But the statute in that case reads: "After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Com-

⁹ 29 U. S. C. 160(d).

¹⁰ 29 U. S. C. 160(f).

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mission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require."¹¹ This statute specifically allows the Commission to modify its order after it has become final. And the court merely held that it was reasonable to suppose that Congress intended the Commission's power to extend to cases where its order had become final by court decree as well as to cases where the order had become final by failure to appeal. The National Labor Relations Board is vested with no such power. Section 10(d)¹² of the Act provides: "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

There is no question that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement. This prevents conflict of authority. *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364. In the *Ford* case, we said, "The authority conferred upon the Board by § 10(d) of the National Labor Relations Act, to modify or set aside its findings and order, ended with the filing in court of the transcript of record." 305 U. S. 364, 368. But the petitioners and the Board contend that although the court has entered its decree, the Board may resume jurisdiction in the same case when it pleases, disregarding the court's decree. This would, indeed, be a peculiar scheme of jurisdiction, devised to prevent interference with the court while it is deliberating to determine what its decree shall be, but allowing the decree to be ignored after it is entered.

The circumstances of the case show how unfair it would be to hold with the petitioners. The employers challenged the Board's order in the original enforcement proceeding, not only as it affected the charged unfair labor practices, but as touching the appropriate relief. When the Circuit Court of Appeals modified and affirmed the order the companies had an opportunity to apply to this court for review, or to comply with the decree as modified by the court. They elected to follow the latter course only

¹¹ 15 U. S. C. 45(b).

¹² 29 U. S. C. 160(d).

to be confronted, years later, with an attempt to rewrite a portion of that decree at a time when their right of review of other portions of it had expired.

We are dealing here with a decree of a court entered in a judicial proceeding. The term at which the decree was entered has long since expired. The only recourse open to the Board is the same that would be open to any other litigant, namely, a bill of review. If the petition disclosed any basis for such a review the answer of the employers sharply raised issues of fact which required resolution before any relief in the nature of a review could be granted. Unless the National Labor Relations Act so requires, the Board was not entitled, as of right, to have the decree it had procured set aside in part and the cause remanded for trial *de novo* in part. There is nothing in the Act to indicate that such a decree is dual in character, part of it final and part of it subject to vacation and reexamination by the Board regardless of the showing made to the court and regardless of the view the court holds as to the propriety of such vacation.

The judgment is

Affirmed.

○
Mr. Justice MURPHY, dissenting.

This case raises important questions concerning the relationship of courts and administrative agencies subsequent to the entry of a judicial decree enforcing an administrative order. Because the particular facts of this case are so essential to a proper determination of these questions and because the Court has not seen fit to refer to the factual situation in other than general terms, it is necessary to review the facts at some length before discussing my reasons for disagreement with the Court's conclusion.

The National Labor Relations Board, after conducting proceedings instituted upon charges filed by the petitioner unions, found that the respondent companies had committed unfair labor practices in violation of Sections 8(1) and 8(3) of the National Labor Relations Act, 49 Stat. 449, 452. On October 27, 1939, the Board entered an order requiring the companies to cease and desist from their unfair labor practices and to take certain affirmative action, including the reinstatement of 207 employees with back pay. Inasmuch as the record at that time convinced the Board that employment opportunities with the companies had been permanently

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and substantially curtailed subsequent to the critical date of July 5, 1935, the Board felt the normal remedy of full back pay would be inappropriate. Under the assumed circumstances, the normal remedy would require the companies to pay in back wages an amount greater than that which they would have paid to the victims of discrimination had there been no unfair labor practices. And it would also give the group of 209 employees more than it presumably would have received under curtailed employment opportunities. The Board therefore devised and set forth in its opinion a special formula giving each claimant only a portion of the full back pay to which he otherwise would have been entitled.¹ 16 N. L. R. B. 727; amended in 18 N. L. R. B. 320.

The companies then filed a petition for review in the court below on November 6, 1939, and the Board countered with a cross-petition for enforcement of its order. On February 10, 1940, the petitioner unions sought and obtained permission from the court to intervene in the proceedings on the claim that since certain of their members had been allowed affirmative relief by the Board they were "vitally concerned with the enforcement of said order of the Board." Leave was also given them to file briefs and participate in the oral argument. Subsequently, on May 21, 1941, the court below rendered an opinion affirming the Board's order with certain modifications not here material and a decree enforcing the order was entered accordingly. 119 F. 2d 903.

On August 23, 1941, the companies offered reinstatement to the 209 employees, thereby fixing that day as the terminal date of the period commencing July 5, 1935, for which back pay was due under the terms of the court's decree enforcing the Board's order. The companies submitted their back pay computations to the Board in May, 1942, and tendered the sum of \$8,409.39 in purported full payment of all back pay, although they later averred that no more than \$5,400 was due under the formula specified by the Board. In accordance with its usual procedure the Board thereupon examined the pertinent pay rolls and records of the companies to verify their computations and to determine whether there had been compliance with the decree. This investigation was completed in October, 1942, at which time the Board became convinced that the provisions of its order as enforced by the court contained certain errors and mistakes relating to back pay and that in framing the special formula it had misconceived the facts

¹ This special formula was noted by this Court in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 198-199, note 7.

as to the availability of employment with the companies for the 209 employees: It appeared to the Board that the companies during the period from July 5, 1935, to August 23, 1941, had been in a position to accord full employment to these 209 claimants as well as to all other former employees reapplying for work and that the normal back wage computations should have been used.

The Board on February 1, 1943, filed a petition with the court below setting forth the situation. It requested that the pertinent paragraphs of the court's decree enforcing the Board's order be vacated and that so much of the cause as was thereby affected be remanded to the Board for further consideration. The companies filed an answer. The unions also filed a brief and participated in the oral argument on this matter. The court, treating the Board's petition as one "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2(d) and 3(b) of the final decree of this Court," dismissed the petition on its merits. 141 F.2d 843. The court later denied without opinion the Board's petition for rehearing and the union's separate motion to modify the decree or to vacate the paragraphs in question and remand to the Board.

I.

Turning to the facts relative to the alleged error, we find that the Board in framing its back pay formula for the 209 employees expressly desired to make them whole and "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." 16 N. L. R. B. at 834. Normally the Board would have directed payment of full back pay to each claimant from the date of discrimination to the date of offer of reinstatement or placement on a preferential rehiring list, allowing due credit for net interim earnings received from other employment. But the Board felt that "the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo," 16 N. L. R. B. at 834, and that a special remedy should be devised.

It appears that a strike, beginning on May 8, 1935, caused the companies to close down for several weeks. On that day approximately 1,100 men were employed by the companies. Operations were resumed on June 12 and the Board found that thereafter the companies discriminatorily refused to rehire the 209 employees in question, referred to as the claimants. Evidence was introduced by the companies, however, to show that after July 5, 1935, the

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effective date of the Act, certain of their mines were sold, many operations suspended, production methods reorganized and specific jobs abolished—resulting in a drastic curtailment of the number of available jobs. According to the Board, only about 600 men were employed by July 5. Some 350 of the 500 employees not then working were claimants in the case, although discrimination was found only as to 209 of them. After July 5 a substantial number of additional men were put to work, but the total number of employees was still considerably short of the pre-strike level of 1,100. The Board apparently assumed that all 1,100 men would reapply for work after the settlement of the strike, thus making the number of available jobs insufficient. As it later became evident, however, not all of the 1,100 reapplied and there were, according to the Board, sufficient opportunities at substantially all times for all who actually reapplied, including the 209 victims of discrimination.

On the assumption that "there were presumably at all times less jobs open than old employees available," 16 N. L. R. B. at 834, and that there was no way of knowing which men would have been reinstated had the companies acted legally, the Board devised a special formula for computing back pay. It directed that there be computed as a lump sum the total amount of wages actually paid to all persons hired or reinstated from and after July 5, 1935, up to the date of compliance with the Board order reinstating or placing the 209 employees on a preferential list. The Board indicated that "we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs." 16 N. L. R. B. at 835, 836. Accordingly, the Board directed that a proportion of the lump sum should be distributed to the 209 claimants. This proportion was to be determined by a governing fraction having as its numerator the number of claimants and as its denominator the total number of claimants and all other pre-strike employees who reapplied for work, whether successfully or not, after July 5, 1935. Thus, by way of illustration, if the lump sum amounted to \$360,000 and there were 200 claimants and 100 other reapplicants, the governing fraction would be two-thirds and the basic sum of \$240,000 would be divided among the 200 claimants, with adjustments being made for net earnings elsewhere. Neither the Board's order nor the court's

enforcing decree fixed the amount of back pay due under this formula. The determination of that sum was left to be made after the period of discrimination ended.

Following the close of the period of discrimination, the Board examined the payrolls and other records of the companies to determine the exact amount of back wages due the 209 claimants. According to the Board, this investigation revealed that, despite any curtailment of employment, the companies at virtually all times after July 5, 1935, had jobs opening up in numbers equal to and at times in excess of the total number of claimants and reapplicants and that such positions were available at virtually all times to all the claimants and reapplicants. This information was submitted by the Board in support of its petition to vacate and remand the portions of the court's decree relating to back pay. It claimed that it had been led into error in framing its original formula by the evidence and contention of the companies relative to curtailed employment and that such a formula, under the facts as they now appeared to the Board, would be grossly inequitable to those who had suffered deprivation of earnings as a consequence of the companies' unfair labor practices.

The parties differ as to whether the Board at the time it framed the special formula was aware of or had access to the facts which it now relies upon. The Board alleges that it was ignorant of these facts and thus misconceived the remedy. The companies state, however, that the Board actually knew of these facts and that, in the exercise of its discretion, it decreed that partial rather than full back wages should be paid. We need not pause to determine this controversy for it appears obvious that, assuming the figures submitted by the Board are true, the special formula specified by the Board is grossly inadequate and falls far short of achieving the expressed desire of the Board in this case "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."

If it were true that there were insufficient jobs for the 209 claimants as well as for the other reapplicants the special formula would be appropriate. Then it could be said that it was impossible to tell whether the 209 claimants would all have been employed by the companies subsequent to July 5, 1935, and that it was therefore necessary to apportion the available jobs among claimants and other reapplicants for purposes of determining how much back pay was due the claimants. But if it is a fact that there were sufficient employment opportunities for all the 209

claimants and the reapplicants at virtually all times, the back pay formula framed by the Board becomes inadequate. Since all of the claimants would then presumably have been employed by the companies at all times but for the discrimination, all of them suffered the loss of the full wages which they would have received and any formula which gives them less than that amount fails to make them whole. And the companies escape paying the full amount of wages they would have paid had they acted legally.

We cannot ascribe to the Board a deliberate intention to prescribe something less than a full make whole remedy. Nothing appears in the Board's opinion or order to that effect. Indeed, the Board's statements of its objectives in this case expressly negative such an intention. And the reason given for fashioning the special formula—the fact that there were presumably at all times less jobs open than old employees available—is consistent only with a desire to compensate the claimants as fully and as equitably as possible under the facts as then contemplated.

In addition to the alleged inappropriateness of the formula as a whole, the Board claims that there are numerous other errors in the back pay provisions that warrant remand for purposes of correction. Thus footnote 155 of the Board's opinion inadvertently contains a serious omission which, contrary to the Board's intention, limits the lump sum used in the formula to the earnings of only 209 employees rather than to the earnings of 209 employees plus the number of old employees reapplying.² The governing fraction includes the latter employees and the lump sum should in turn reflect their earnings. Otherwise the claimants are limited to a small part of their proportionate loss in wages. Moreover, the formula illogically requires that there be deducted from each claimant's share the full amount rather than a pro rata share of his interim earnings. These errors and certain ambiguities³

² This footnote appears at 16 N. L. R. B. at §35. With the words in brackets originally being omitted by the Board and being added here to indicate the Board's intended modification, this footnote reads as follows:

"If at any given time, during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against [plus the number of old employees reapplying]; only the earnings of a number of such employees equal to the number of claimants discriminated against [plus the number of old employees reapplying] shall be counted in computing the lump sum."

³ The Board claims that since the number of claimants and reapplicants varies from week to week, the formula is ambiguous as to whether a single governing fraction, based on the average, or on the maximum numbers of claimants and reapplicants; or successive governing fractions, based on the actual numbers, are to be constructed for the period of discrimination. It is also said that the formula fails to define the "average earnings" referred to in the last sentence of footnote 155 of the Board's opinion.

serve to make the partial back pay formula an ineffective means for making the employees as whole as possible even on the assumption that employment opportunities had been curtailed. The remedy which the Board originally found to be essential to carry out the purposes of the Act is thereby rendered inadequate.

The practical impact of this situation on the employees involved is serious and substantial. Under the Board's partial and mathematically inaccurate back pay formula which this Court now insists must be followed, the companies claim that the 209 employees are entitled to only \$5,400. But if the true facts are as represented by the Board and if it should be determined that the full back pay formula should be utilized under such circumstances, approximately \$800,000 would be due these 209 employees after allowance for interim earnings elsewhere. Thus these employees must bear the loss of nearly \$795,000 in unpaid back wages resulting from the unfair labor practices of the companies. On them rests the penalty for what this Court euphemistically calls "little more than a mistake in arithmetic."

It is thus clear that unless the Board is given some opportunity to reexamine its back pay remedy much of the loss resulting from the companies' unfair labor practices may be shifted from the companies to the employees and the public policy of the Act may be largely circumvented. Our concern here is not with the truth of the facts alleged by the Board or with the appropriateness of any other remedy the Board might devise. It is enough that the Board has cast sufficient doubt on the appropriateness and correctness of its original remedy to warrant resubmission of the matter to the Board for further consideration. The Court today does not attempt to deny that the situation is an intolerable one in light of the alleged facts or that modification or remand of the back pay provisions of the decree is a reasonable request under such circumstances. Hence, unless some principle of law or statute compels the opposite conclusion, such a remand should have been made.

II.

The pertinent legal and statutory rules, in my opinion, do not preclude remand of the back pay provisions of the court's decree to the Board under these circumstances.

The companies argue that the exercise of the Board's discretion in devising a back pay formula became a finality by virtue of the enforcing decree of the court below and that this formula cannot

14. *Int. Union of Mine, Mill and Smelter Workers, et al.*
vs. Eagle-Picher Mining and Smelting Co. et al.

be modified or reconsidered at this late date. It is claimed that all rights and liabilities under the decree were fixed and fully accrued on August 23, 1941, the terminal date of the period of discrimination, and that the court below had no jurisdiction to vacate or remand any portion of that decree subsequent to the end of the term in which it was entered.

But it is plain that the back pay formula, as enforced by the court's decree, was at most provisional and tentative in character. Cf. *United States v. Swift & Co.*, 286 U. S. 106, 114. It did not pretend to be based upon detailed and comprehensive findings as to actual employment opportunities and actual losses suffered during the entire period of discrimination—facts which were impossible to determine until after the close of that period. Even though the hearing closed on April 29, 1938, that part of the order relating to back pay spoke as of July 5, 1935. The Board merely assumed from certain evidence and allegations that there would be decreased employment opportunities at all times after July 5, 1935, and left to the future the problem of uncovering the complete facts. The formula was drawn in light of that assumption, an assumption that necessarily contemplated that undisclosed or new facts or a removal of a misconception of the true facts might call for an adjustment in the remedy to be applied. And the enforcing decree of the court in no way affected the tentative and unexecuted nature of this formula.

The rights and liabilities under such a back pay formula could not become final until the Board or the courts were satisfied with the application of the formula to the actual facts or until the formula ripened into an executed decree. The sole purpose of the remedy was to vindicate the public policy by compensating the employees for the losses they had suffered due to the unfair labor practices of the companies rather than to punish the companies. Until it was authoritatively determined that the remedy did accomplish this purpose as applied to the actual facts, or until the decree was fully executed, no rights and liabilities can be said finally to have accrued. Thus the companies had no vested right on the day they ceased their discriminatory policy relative to the 209 employees to compensate those employees according to a formula which woefully failed to make the employees whole. The relevant portions of the decree could still be modified or remanded.

As the court below recognized, it retained "jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted." 141 F. 2d at 845. A court has the unquestioned

and continuing power to make corrections and changes in its unexecuted decrees even after the term of court in which they were originally entered has expired. See *Root v. Woolworth*, 150 U. S. 401; *Shields v. Thomas*, 18 How. 253; 8 *Cyclopedia of Federal Procedure* (2d ed.) § 3598 and cases there cited. This includes the power to modify or grant additional relief in the interest of enforcing or effectuating decrees. Thus the doctrine of finality of judgment has no relevance as applied to unexecuted decrees and cannot be utilized to deny power in the court below to modify or remand the back pay provisions of the decree to the Board. No specific provision in the National Labor Relations Act, moreover, is necessary in order to appreciate that any decree requiring future action is upon entry partly final and partly unexecuted. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States v. Swift & Co.*, 286 U. S. 106, 114. As to the unexecuted portion of the decree below, finality obviously has not accrued.

On the facts alleged in the Board's petition and in the unions' motion, the court below plainly erred in refusing to allow the Board to reconsider the back pay remedy. Under Section 10(c) of the Act, the Board is authorized to require such affirmative remedial action, "including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." As the Court recognizes, the nature and extent of the back pay remedy are thus primarily and peculiarly matters lying within the administrative discretion of the Board, and a court's function is limited to imparting legal sanction to the back pay remedy once it has determined that the Board has acted within the confines of its authority. A court cannot exercise the discretion that Congress has given only to the Board. But if, as conceded, a court can neither affirm nor reverse a Board order relating to back pay on the basis of its own conception of effectuating the policies of the Act no less should it refuse to allow the Board to reconsider an unexecuted remedy once proposed if the Board reasonably feels that the public policy which it guards demands such action. The special competence of the Board to require affirmative remedial action necessarily includes a special competence to modify, amend or repeal such a requirement prior to its consummation.

It does not follow, as the Court assumes, that the Board at any time and for any reason satisfactory to it may recall that part of the enforcing decree relating to affirmative relief and start afresh.

The requirement of reasonableness applies here as elsewhere. If the Board's request is so baseless and unnecessary as to exceed the bounds of reasonableness refusal to remand lies within the sound discretion of the court. But here it is undeniable that if the facts stated by the Board are true the unexecuted remedy is entirely inadequate to achieve the purposes for which it was designed. Employees suffer for the sins of their employers and the public policy underlying the requirement of back pay is largely frustrated. To deny a remand under such circumstances is to abuse a court's discretion and to transform the judicial system into a weapon against the innocent victims of an administrative error.

The responsibility of the Board for proposing remedies to effectuate the policies of the Act is a continuing one. Cf. *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 705-706. It is not necessarily lifted by reason of the entry of a judicial decree of enforcement, although it may be suspended temporarily during the pendency of review proceedings in the appellate court. *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364. If at any time before the decree is executed, the Board becomes convinced that the remedy as tentatively approved by the court will no longer serve the statutory purposes, reason and justice dictate that the Board should have the opportunity to reconsider the matter. Whether the inadequacy of the remedy be due to inadvertence, negligence, fraud or other reasons, there is no recognizable public or private interest in executing such a remedy. To hold that a particular back pay remedy must be imposed when the Board reasonably suspects that it is incorrect or inadequate is to project legalism to an absurd and dangerous length.

We are not dealing here with an ordinary common-law money judgment which one party seeks to set aside for fraud, mistake or newly discovered evidence. Nor are we met with an ordinary litigant seeking relief for itself from a judicial decree. We are concerned, rather, with the attempt of an administrative agency to effectuate the policies set forth in a Congressional mandate. Until those policies are effectuated through the enforcement and execution of statutory remedies, the agency and the courts should coordinate their efforts to realize the plain will of the people. *United States v. Morgan*, 307 U. S. 183, 191.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this dissent.